

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001201-MR

LAW OFFICES OF JOHN P. PLYMIRE, PLC

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CI-005704

R.W. LYNCH, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,¹ SENIOR JUDGE.

KELLER, JUDGE: The Law Offices of John P. Plymire, PLC (Plymire) appeals from the Jefferson Circuit Court's order denying its motion to set aside a foreign judgment. On appeal, Plymire primarily argues that the contract that formed the

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

basis for the foreign judgment was void and not enforceable. Additionally, Plymire argues that its payment under the contract did not act to validate the otherwise invalid contract. Finally, Plymire argues that the circuit court made erroneous findings regarding the payment made under the contract and that the proof offered by R. W. Lynch, Inc. (Lynch) did not support the circuit court's findings. Lynch argues that the contract was valid and enforceable. Furthermore, Lynch argues that, by failing to participate in arbitration and the subsequent California court proceedings to confirm the arbitration award, Plymire waived its right to challenge the arbitration award. For the reasons set forth below, we affirm.

FACTS

On June 30, 2003, Plymire signed an Advertising Services Agreement with Lynch. Pursuant to the agreement, Lynch was required to provide advertising services for Plymire in exchange for an initial payment of \$5,875.00 with ten \$2,200.00 monthly installments thereafter. Plymire alleged that it was advised by representatives from Lynch that the advertising would generate seven to twelve cases a month with a per case value of \$2,000. However, after three months, Plymire had received only one case, with a value of less than \$500. Therefore, Plymire notified Lynch that it was terminating the contract.

By way of response, Lynch stated that it had not made any promises to Plymire regarding case generation but only discussed "call history." Lynch stated that, after Plymire sent the notification of termination, its representatives attempted to contact Plymire a number of times but received no response.

Therefore, Lynch filed for arbitration under the arbitration provisions of the contract. When notified of the arbitration demand by Lynch, Plymire stated that it would not be participating because the contract was void. In defense of its position, Plymire stated that it had not received a signed copy of the contract from Lynch, which was a requirement for the contract to become enforceable. The arbitrator advised that the arbitration would go forward, absent “an agreement of the parties or a court order staying” the matter. Without Plymire’s participation, the arbitration went forward, and the arbitrator awarded Lynch a total of \$32,268.20 plus interest. Lynch then obtained an order of confirmation of the arbitrator’s award and a judgment from the Superior Court of the State of California for the County of Contra Costa. Although it had notice, Plymire did not participate in any of the proceedings before the California court and did not seek any relief in California from the arbitrator’s award or the judgment from the California court.

On June 29, 2006, Lynch entered the California judgment in Jefferson Circuit Court, and Plymire filed a motion for relief from that judgment. In support of its motion, Plymire argued that the contract was not valid because it had not received a signed copy. Plymire further argued that, because the contract was not enforceable, the arbitration was not binding and the California judgment was, therefore, not valid. Lynch responded that the contract was enforceable; the arbitration was binding; and the California judgment was valid. The circuit court found as follows:

On, or to be effective July 1, 2003, Defendant attorney entered into an Advertising Agreement with Plaintiff, a California corporation. The parties had a dispute over payments and the matter was submitted to arbitration under the terms of the agreement. On December 21, 2005, an arbitration award was granted to Plaintiff.

Defendant filed the present Motion to Set Aside Foreign Judgment on September 13, 2006 claiming that the “contract” upon which the California judgment is based is invalid.

Both parties reference CR 60.02 and KRS 417.060. The latter allows an arbitration award to be vacated if obtained by corruption, fraud, or lack of valid arbitration agreement. CR 60.02 allows a Court to vacate its judgment if there is a showing of mistake, newly discovered evidence, fraud affecting the proceedings, or any other reason of an extraordinary nature.

Defendant claims he is entitled to relief under CR 60.02 by claiming Plaintiff obtained the judgment by using arbitration to which Defendant claims he never consented and by using a forum which had no jurisdiction over him (California).

The Court has been presented with no proof that Defendant was fraudulently induced to sign the agreement at issue. Plaintiff has provided the executed contract and an affidavit of one of its representatives (Affidavit of Natasha Lucin Wiseman). Defendant was a licensed, practicing attorney at the time of this agreement; he made two payments thereunder until he ceased doing so, indicating affirmation of a valid contract. See *Hamptom v. Suter*, Ky. 330 S.W. 2d 402 (1959) [sic].

Further, the agreement clearly sets forth a choice of laws clause and a mandatory arbitration clause, (paragraph 13 and 19 of Advertising Agreement.) Arbitration awards may be vacated where procured by fraud, where arbitrator exhibits partiality or exceeds his powers or where there existed no arbitration agreement. KRS

417.160. The record is devoid of any proof which would support vacating the award in this case.

Defendant's Motion to Set Aside and Vacate the Foreign Judgment is **DENIED**.

It is from this order that Plymire appeals. In addition to the arguments it made before the circuit court, Plymire argues that the circuit court held it to a higher standard because its principal is an attorney and that the circuit court misstated the number of payments Plymire had made. Lynch argues that the court did not abuse its discretion when it denied Plymire's motion and that Plymire did not timely challenge the arbitration award.

STANDARD OF REVIEW

The standard of review for denial of a motion under CR 60.02 is whether the trial court abused its discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); *see also Berry v. Cabinet for Families & Children*, 998 S.W.2d 464, 467 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Relief under Civil Rule 60.02 is an extraordinary remedy and the denial of such a motion will only be reversed where a clear abuse of discretion is shown. *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). It is with this standard in mind that we will analyze the issues raised by Plymire.

ANALYSIS

Plymire's primary argument is that the contract was not enforceable and that it could not be bound by any proceedings flowing from the contract. However, we need not address that issue because of the procedural issue raised by Lynch - that Plymire did not timely dispute the arbitration award.

As noted by Lynch, KRS 417.160(2) provides that application to vacate an arbitration award must be made to the court "within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known." Furthermore, under California law, "[a] petition to vacate an [arbitration] award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner."

The arbitration award was issued on December 21, 2005. Plymire did not move to vacate that award either in California or Kentucky within the time limits set forth by statute. Therefore, it is foreclosed from contesting that award now.

Based on the preceding, we need not reach any of the issues raised by Plymire, and we will not do so.

CONCLUSION

Because Plymire did not comply with the time limitations to contest the arbitration award, it is foreclosed from doing so now. Therefore, the circuit court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John P. Plymire
Louisville, Kentucky

NO ORAL ARGUMENT
PRESENTED.

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

W. Scott Stinnett
Louisville, Kentucky