

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001637-MR

E.H. CONSTRUCTION, LLC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 09-CI-01620

ALPHA CONCRETE CONSTRUCTION, LLC;
AND W.T. CONGLETON CO.

APPELLEES

OPINION
VACATING AND
REMANDING

** ** *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR
JUDGE.

DIXON, JUDGE: E.H. Construction, LLC, appeals from an order of the

Fayette Circuit Court denying E.H.'s motion to compel arbitration and stay

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 Kentucky Revised Statutes (KRS) 21.580.

litigation pending arbitration. After careful review, we vacate and remand.

The underlying dispute in this case relates to the construction of a Kroger grocery store in Lexington, Kentucky. In July 2008, E.H., the general contractor for the project, entered into a contract with Alpha Concrete Construction, LLC, to install a cement floor at the Kroger site. In turn, Alpha executed agreements with W.T. Congleton Co. and Broughton Construction, LLC, for materials and labor necessary to complete the project.

In March 2009, Congleton initiated litigation against Alpha, Broughton, and Kroger, alleging breach of contract and unjust enrichment. Thereafter, Alpha filed a third-party complaint against E.H., alleging breach of contractual and statutory duties. E.H. responded by filing a motion to stay the circuit court litigation and compel arbitration pursuant to KRS 417.060(1), which states:

On application of a party showing an agreement [to arbitrate] described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.

The court held a hearing on August 27, 2009, to address E.H.'s motion. E.H. and Alpha each relied on a different provision of the contract to support their respective positions. E.H. argued that arbitration was required pursuant to Article 15, "Dispute Resolution," which states in relevant part:

15.1 AGREEMENT TO ARBITRATE All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise.

In contrast, Alpha contended that it was not obligated to arbitrate the dispute because it had terminated the agreement due to E.H.'s failure to make payments as required by the contract. To support its theory, Alpha relied on Article 17 of the contract, "Termination by Subcontractor," which states:

If the Subcontract Work has been stopped for thirty (30) calendar days because the Subcontractor has not received progress payments as required under Article 14, or has been abandoned or suspended for an unreasonable period of time not due to the fault or neglect of the Subcontractor, then the Subcontractor may terminate this Subcontract upon giving the Contractor seven (7) calendar days' written notice and the Contractor's failure to cure within such seven (7) day period. Upon such termination, Subcontractor shall be entitled to recover from the Contractor payment for all Subcontract Work satisfactorily performed but not yet paid for, including reasonable overhead and profit thereon not to exceed 15 (fifteen) percent. The Contractor's liability for any other damages claimed by the Subcontractor under such circumstances shall be extinguished pursuant to Subparagraph 13.2.2 [addressing subcontractor's claims against the property owner] above.

The court agreed with Alpha's argument and concluded that the arbitration clause did not survive Alpha's termination of the contract and that termination rendered the contract non-existent as a matter of law. Pursuant to its

findings and conclusions in favor of Alpha, the court rendered an order denying the motion to compel arbitration. E.H. now appeals that order.²

On appellate review of an order denying a motion to compel arbitration, we defer to the trial court's findings of fact, unless clearly erroneous, and we review the court's application of the law to the facts *de novo*. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). After careful review, and without the benefit of a responsive appellate brief from Alpha, we conclude that the court erred as a matter of law by denying E.H.'s motion to compel arbitration.

At the outset of our analysis, we note that, due to the similarities between the Federal Arbitration Act³ and Kentucky's Uniform Arbitration Act,⁴ we need not "determine in this proceeding whether state or federal law is applicable to the arbitration of the parties' contract, as '[t]he outcome is the same under both' state and federal arbitration law." *Consultants and Builders, Inc. v. Paducah Fed. Credit Union*, 266 S.W.3d 837, 839 (Ky. App. 2008) (*quoting Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004)). Furthermore, this Court has stated, "Contractual arbitration agreements are subject to the rules of contract law, including the fundamental rule that 'absent fraud in the inducement, a written

² Although Congleton is a named Appellee, the controversy at issue on appeal concerns E.H. and Alpha; consequently, we will not include Congleton as an interested party in our analysis. Further, neither Alpha nor Congleton filed appellate briefs in this appeal.

³ 9 U.S.C. § 1, *et. seq.*

⁴ KRS 417.045, *et. seq.*

agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms.” *Id.*, (quoting *Conseco*, 47 S.W.3d at 341.).

In the case at bar, the arbitration clause states in pertinent part: “All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, . . . shall be decided by arbitration[.]” The United States Supreme Court has found such broadly worded arbitration clauses to survive contract termination where the post-termination dispute “arises under the contract.” *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 205, 111 S. Ct. 2215, 2225, 115 L. Ed. 2d 177 (1991); *See also Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255, 97 S. Ct. 1067, 1074, 51 L. Ed. 2d 300 (1977) (If a contract does not “expressly or by clear implication” indicate that the duty to arbitrate ceases upon termination, it “affords a basis for concluding that [the parties] intended to arbitrate all grievances arising out of the contractual relationship.”). Likewise, courts in other jurisdictions have applied similar reasoning. *See, e.g., Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1194 (Fla. Dist. Ct. App. 2007) (“[I]t is well established that the duty to arbitrate does not necessarily end when a contract is terminated, as long as the dispute concerns matters arising under the contract.”); *Henry v. Gonzalez*, 18 S.W.3d 684, 690 (Tex. App. 2000) (“[A]n arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole.”); *Chester City Sch. Auth. v. Aberthaw Constr. Co.*, 333

A.2d 758, 764 (Pa. 1975) (Where an arbitration clause is broadly written, it is “completely inconsistent to suggest that a unilateral repudiation or termination was intended to foreclose the right to resort to arbitration.”).

In analyzing the issue before us, we note, “Once *prima facie* evidence has been presented showing the existence of a right to arbitrate, a presumption of its validity accrues and the burden of going forward with evidence to rebut the presumption shifts to the party seeking to avoid the agreement.” *Weis Builders, Inc. v. Complete Contracting, Inc.*, 247 S.W.3d 542, 545 (Ky. App. 2008) (citation omitted). Here, Alpha attempted to rebut the presumed validity of the arbitration clause in the parties’ contract by relying on its unilateral termination of the contract under Article 17. After careful consideration, we are not persuaded that Alpha sustained its burden.

A review of the agreement between E.H. and Alpha does not reveal limiting language that would preclude post-termination arbitration of disputes arising under the contract, even if Alpha followed the procedure delineated in Article 17. Indeed, Article 15 plainly requires the parties to arbitrate claims arising from a breach; there is simply no contractual language supporting a theory that the parties intended an Article 17 termination to nullify the arbitration clause. *Litton*, 501 U.S. at 208, 111 S. Ct. at 2226. Consequently, regardless of whether Alpha properly terminated the contract, it was obligated to arbitrate its dispute if those complaints arose out of the contractual relationship with E.H. *Nolde Bros.*, 430 U.S. at 255, 97 S. Ct. at 1074.

In the third-party complaint, Alpha alleged that E.H. improperly withheld payments for Alpha's work on the Kroger project, which constituted a breach of contractual and statutory duties owed to Alpha. Given the nature of Alpha's allegations, we find that its claims clearly related to the subject matter of the contract and arose out of the parties' contractual relationship. *See Conseco*, 47 S.W.3d at 340 (claims alleging breach of warranty and violations of the Consumer Protection Act were "brought into play by virtue of the [underlying] contract").

After thorough consideration, we hold that the trial court erred as a matter of law by concluding that the arbitration clause did not survive Alpha's purported termination of the agreement.⁵ We vacate the trial court's order denying E.H.'s motion to compel arbitration and stay litigation, and we remand this case for further proceedings consistent with this opinion.

For the reasons stated herein, we vacate and remand the order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

G. Bruce Stigger
Keith D. Heath
Jean B. Maron
Louisville, Kentucky

⁵ In light of our decision, we decline to address any remaining issues raised by E.H. on appeal.