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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001852-MR

ELISA M. HARLOW,
EXECUTRIX FOR THE
ESTATE OF EUGENE SALESMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CI-011816

BEVERLY HEALTH AND
REHABILITATION SERVICES,
INC., D/B/A CAMELOT HEALTHCARE
SPECIALTY CENTER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, KELLER, AND STUMBO, JUDGES.

MOORE, JUDGE: Elisa M. Harlow, Executrix for the Estate of Eugene Salesman, appeals the Jefferson Circuit Court's decision affirming an arbitration order

dismissing arbitration in a nursing home abuse case. After careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Eugene Salesman filed a nursing home abuse case against four defendants, including Appellee Beverly Health & Rehabilitation Services, Inc. While the suit was pending, Salesman passed away on April 7, 2005.

On May 3, 2005, the court granted Beverly's motion to amend its answer. This amended answer asserted for the first time that the matter should be sent to arbitration. On May 3, 2005, the court ordered the action to be held in abeyance until further order. After a hearing on May 26, 2005, the court signed, on June 3, 2005, an order which set aside the May 3, 2005 order for the limited purpose of allowing the parties to conduct discovery on the issue of the validity of the arbitration agreement. The case continued to be held in abeyance in all other respects.

On May 25, 2005, Salesman's niece, Elisa M. Harlow, was appointed by the Jefferson Probate Court as Executrix of her uncle's estate. Harlow, as Executrix of Salesman's estate, filed a response to Beverly's motion to arbitrate.

On May 19, 2006, all defendants moved the court to dismiss the actions filed against them because Harlow did not revive the action within one year of Salesman's death. Harlow submitted a memorandum and reply opposing the defendants' motions. A hearing was held before the trial court on August 14,

2006, with two subsequent orders issued dismissing Beverly and the other defendants.

After Harlow filed an appeal from the trial court's dismissal of the defendants, she asked Beverly if it still wished to arbitrate the case. There being a mutual interest to arbitrate the case in lieu of extending litigation through an appeal, Harlow agreed to voluntarily withdraw the appeal in consideration of arbitrating the case. Beverly agreed, and Harlow dismissed the appeal for the purposes of going to arbitration.

Once the case was submitted to arbitration, Beverly moved the arbitrator to dismiss the case based on res judicata and collateral estoppel grounds. The arbitrator denied Beverly's motion and held that the trial court did not previously have subject matter jurisdiction due to the arbitration agreement. Therefore, the trial court's order could not act as res judicata or collateral estoppel.

Beverly then filed a second motion to dismiss, this time based on statute of limitations grounds and that Harlow had waived her right to arbitrate. On October 2, 2008, the arbitrator granted Beverly's second motion to dismiss.

Harlow moved the arbitrator for reopening and reconsideration on the basis that the October 2, 2008 order was ambiguous and contained evident material mistakes, including a failure to consider the Kentucky Saving Statute, Kentucky Revised Statute (KRS) 413.270. The arbitrator subsequently denied Harlow's request for reopening and reconsideration.

Harlow, on May 12, 2009, then moved the trial court to vacate the arbitration order based on the award being procured by corruption, fraud or other undue means under KRS 417.160(1)(a) and that the arbitrator exceeded his power under KRS 417.160(1)(c). The trial court denied Harlow's motion to reverse or vacate the arbitration award. This appeal followed.

II. ANALYSIS

I. THE ARBITRATION AWARD WAS NOT PROCURED BY FRAUD OR UNDUE MEANS.

Harlow contends that the trial court erred (1) in its interpretation of fraud regarding procuring arbitration awards and (2) failed to consider "undue means" in procuring the arbitration award. We disagree.

Although deference is generally given to arbitration awards, the Kentucky Uniform Arbitration Act (KUAA) instructs trial courts to vacate them in given circumstances. *Conagra Poultry v. Grissom Transp.*, 186 S.W.3d 243 (Ky. App. 2006); KRS 417.160. The KUAA provides that a trial court *shall* vacate an award when "[t]he award was procured by corruption, fraud or other undue means." KRS 417.160(1)(a). Harlow alleges both fraud and undue means, but not corruption.

"[O]ur review of a trial court's ruling in a KRS 417.060 proceeding is according to usual appellate standards. That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and

application of legal principles." *Conseco Finance Services Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

The trial court's opinion and order denying Harlow's motion to reverse or vacate the arbitration order contains a recitation of facts, which methodically identifies all of the allegations and procedural steps of the original litigation, appeal, and arbitration. The trial court clearly discusses Harlow's claim that the arbitration was procured by fraud or undue means and identifies the six elements of fraud upon which such facts must be reviewed. The trial court found the facts, when applied to the law, did not support Harlow's contentions:

> Even when the Court considers the matter in a light most favorable to Ms. Harlow, it cannot say her argument concerning fraud or undue means is convincing. Presume the Defendant specifically told Ms. Harlow, "We want to arbitrate this case. We will agree to arbitrate the case if you dismiss the appeal;" where is the falsity in these representations? The Defendant did agree to arbitrate; this is obviously so because the case came before an Arbitrator for a decision. What Ms. Harlow has not, and likely cannot, say is that the Defendant *also* agreed to waive any defenses when it agreed to arbitrate. Taking a case to an arbitrator and arguing that dismissal is proper is not fraudulent. Indeed, without an agreement between the parties that the Defendant would waive any defenses it had at its disposal, it could be considered a violation of counsel's duty of representation *not* to present those defenses.

The trial court specifically found that there was no false statement and thus no fraud in the representation. Harlow had the burden of proving each element of fraud by clear and convincing evidence. *Wahba v. Don Corlett Motors, Inc.*, 573

S.W.2d 357, 359 (Ky. App. 1978). Absent the required element of falsity, Harlow's argument fails.

We agree with the trial court's analysis. Factually, the agreement was to submit the case to arbitration, which was done. The arbitrator denied Beverly's motion to dismiss based on res judicata, allowing Harlow the opportunity to plead her claim again without regard to the trial court's prior dismissal. After dismissing the arbitration, the arbitrator granted Harlow's motion to reconsider, over objection that the arbitrator lacked jurisdiction due to the pending appeal to the lower court. Therefore, Harlow was given ample opportunity to plead her claim.

Harlow insists however that she was denied arbitration "on the merits" because it was dismissed on statute of limitation grounds. A decision "on the merits" is a determination of which party is in the right, based upon the facts, as opposed to a dismissal without prejudice based solely on a procedural error that permits a party to file again. *See* Black's Law Dictionary, 6th ed. (1990) ("A party who has received a judgment on the merits cannot bring the same suit again."); *see also Snodgrass v. Snodgrass*, 297 S.W.3d 878, 885 (Ky. App. 2009).

The arbitrator found that Harlow's claim must be dismissed for the same reason given by the trial court, *i.e.*, failure to file within the applicable period of limitations. The action had not been revived within one year of Salesman's death as required by KRS 395.278. As a statute of limitation, compliance with the statute is mandatory. *Frank v. Estate of Enderle*, 253 S.W.3d 570 (Ky. App. 2008). Therefore, this was not a dismissal on mere procedural grounds, but a

determination on the facts, with prejudice, on the merits. *See e.g., Dennis v. Fiscal Court of Bullitt County,* 784 S.W.2d 608, 609 (Ky. App. 1990). Consequently, Harlow did receive an arbitration decision on the merits. Accordingly, we cannot say that the trial court's decision was clearly erroneous.

II. THE ARBITRATOR ACTED APPROPRIATELY AND WITHIN HIS POWERS.

Harlow also contends that the arbitrator exceeded his powers requiring the arbitration award to be vacated under KRS 417.160. We disagree.

Harlow first contends that the arbitrator exceeded his powers when he denied Harlow's request for reopening and reconsideration. As a basis for this contention, Harlow argues that "the oral agreement between Appellant and opposing counsel was presented to the arbitrator [and] fixed the boundaries of deciding the matter submitted to those factors and grounds within the underlying claim."

There is no evidence in the record suggesting that any "boundaries" were placed on the arbitration. It is clear from the record that there was an agreement to arbitrate, but there was never an agreement between the parties to waive substantive defenses such as the statute of limitations. Both the trial court and arbitrator made it clear in their findings that there was no evidence of such agreement to waive substantive defenses. Therefore, Harlow cannot establish grounds to vacate the arbitration order under this contention.

Harlow also contends that the arbitrator exceeded his power in ruling that the action was not covered by the Kentucky Saving Statute, KRS 413.270. Harlow argues that since the arbitration claim was filed within ninety (90) days of the voluntary dismissal of the appeal, the statute "saves" the action from dismissal under the statute of limitations. However, the Saving Statute requires that the original action be timely filed. Here the original trial court action was filed by Salesman within one year of the alleged negligent conduct. But Harlow, as the Executrix of the Estate, failed to revive the action by substituting as the proper plaintiff within one year of Salesman's death as required by KRS 395.278 and CR 25.01(1). The civil action was dismissed on the merits because the statute of limitations had run. The Saving Statute does not toll the statute of limitation, and does not apply where the dismissal is based on the statute of limitations and not lack of jurisdiction. *See Lair v. Johnson*, 313 S.W.2d 272, 273 (Ky. 1958).

Both the arbitrator and the lower court considered and rejected application of the statute. The arbitrator provided a careful and detailed analysis of the law and facts, concluding that the statute did not apply because the trial court did not dismiss for lack of jurisdiction (as required by the statute), but for failure to file within the statute of limitations. The trial court reviewed that analysis and agreed. As we defer to the trial court's findings of fact, we cannot say that the trial court's decision in this regard was clearly erroneous.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Martha Marie Eastman
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. Courtney Guild, Jr.
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