RENDERED: JUNE 10, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000251-MR

STEVE COLDWELL, SUCCESSOR
TRUSTEE OF WILLIAM F. MARANO
LIVING TRUST; JOSEPH ARBUSTO;
DEAN CHARLES BAYER;
JERRY AND MERRILL HAAS,
TRUSTEES OF THE JERRY AND
MERRILL HAAS TRUST;
ROLAND B. LEONARD, TRUSTEE
OF ROLAND B. LEONARD
REVOCABLE TRUST; JOHN R. AND FRANCINE
A. MANIS, TRUSTEES OF THE MANIS FAMILY
TRUST U.D.T., DTD. FEBRUARY 11, 1983;
DANIEL F. McMASTER; JEAN L. AND
URSULA H. REYNOLDS, TRUSTEES
OF THE REYNOLDS FAMILY TRUST;
RUTHANN RHODES; ALVIN B. RICHARDS,
TRUSTEE OF THE R.F. REVOCABLE TRUST;
BEVERLY CATHERINE ROMERO;
ROY AND RUTA SHELLEY; and
GAIL WHITAKER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CI-001583

PEDLEY, ZIELKE, GORDINIER,
& PENCE, PLLC, f/k/a
PEDLEY, ZIELKE, GORDINIER,
OLT & PENCE, PLLC;
THE ESTATE OF LAWRENCE
PEDLEY; and
LAWYERS MUTUAL INSURANCE
COMPANY OF KENTUCKY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: The above-referenced appellants (collectively, the "Coldwell Appellants") appeal the decision of the Jefferson Circuit Court denying them leave to file a Civil Rule (CR) 14.01 complaint in a post-arbitration dispute with the Estate of Lawrence Pedley (the "Pedley Estate") and Lawrence Pedley's former law firm, Pedley, Zielke, Gordinier, and Pence, PLLC, f/k/a Pedley, Zielke, Gordinier, Olt & Pence, PLLC ("PZGOP"). The substance of the Coldwell Appellants' proposed complaint sought a determination from the circuit court regarding whether, and to what extent, the arbitrator had awarded damages based upon the conduct of Lawrence Pedley and PZGOP, as it related to the rendering of professional legal services. The circuit court denied the Coldwell Appellants leave

[1] Senior Judge Sheila R. Issac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

to file their complaint because, as it reasoned, it had no jurisdiction to allow the Coldwell Appellants to file it.

As an aside, on March 14, 2011, this Court ordered the Coldwell Appellants to show cause as to why their appeal should not be dismissed.[2] The Coldwell Appellants timely responded and, having shown good cause, we will now address the merits of their appeal and affirm the circuit court's decision.

FACTUAL AND PROCEDURAL HISTORY

This matter largely revolves around a dispute between the Coldwell Appellants, the Pedley Estate, and PZGOP. In October, 2005, the Coldwell Appellants filed a complaint in the Superior Court of California, alleging that Martin Twist and two of his entities, Martin Twist Energy Company, LLC, and Cherokee Energy Company, LLC, made several fraudulent misrepresentations and violated several consumer protection statutes in connection with securities transactions relating to limited partnerships in oil and gas ventures. The portion of their complaint relevant to the Pedley Estate and PZGOP states:

> 132. Defendants Pedley and PZGOP were general counsel to Twist LLC, Cherokee, Twist, and each partnership. Pedley drafted the offering materials,

[2] An essential part of our analysis involves whether the circuit court actually confirmed the arbitration award at issue against the Pedley Estate. Prior to the Coldwell Appellants' response to our show cause order, the record appeared to answer that question in the negative. In particular, while the circuit court entered a January 20, 2010 order confirming the arbitration award, it also entered a subsequent order of February 17, 2010, which appeared to vacate its confirmation.

In their collective responses, however, all parties to this appeal have agreed that the circuit court did confirm the arbitration award against the Pedley Estate. Additionally, the Coldwell Appellants have supplemented the record with an order to that effect, which does not appear in our record of this matter, but appears to have been entered by the circuit court on March 3, 2010.

including the private placement memorandums describing limited liability partnerships organized to drill, complete and operate natural gas wells on leased property in various counties in Kentucky, West Virginia, and Texas. Pedley drafted the offering materials with knowledge that Defendants would distribute the materials nationally to offer and sell unqualified, unregistered securities. Pedley also drafted the various legal agreements, including the Limited Liability Partnership Agreement and Terms of the Offering, the Subscription Agreement, and the Turnkey Drilling and Completion Agreement. With Defendants Pedley and PZGOP's knowledge and consent, these materials were distributed to investors, including plaintiffs, and plaintiffs relied upon these documents in making their decisions to purchase Cherokee's securities.

133. The offering materials represented that PZGOP was "counsel to the Partnership." The offering materials also contained PZGOP's express opinion related to the partnership and current federal income tax. Accordingly, defendants Pedley and PZGOP certified and expertized [sic] the offering materials and permitted their name to be published as such in the materials.

134. A close comparison of each of the Cherokee limited liability partnership offering circulars and private placement memorandums reveals that defendants Pedley's legal work fell far below the standard of care owed by an attorney.

135. In addition to his direct participation in the Cherokee defendants' fraudulent investment scheme, Defendant Pedley knew of and intentionally aided and abetted the Cherokee defendants' investment scam as well as breached his duties by, among others, representing conflicting interests without waivers, falling below the standard of conduct required by attorneys.

136. Further, Pedley induced investors, including plaintiffs to invest in Cherokee's investment scam through several video presentations that were made with Pedley's knowledge to be provided to potential investors,

> including plaintiffs, for the purpose of offering and selling Cherokee's fraudulent unqualified securities.
>
> 137. Pedley and PGZOP participated in and provided substantial assistance in defendants' fraudulent scheme in order to continue to get the business and work from Twist, Twist LLC, Cherokee, and their related entities.

The Coldwell Appellants' complaint asserted several claims of fraud, statutory violations, and malpractice against Lawrence Pedley, and also asserted these claims against his firm, PZGOP. However, during the litigation, a question arose regarding whether Lawrence Pedley had acted as a provider of professional services at all times under the facts alleged in the Coldwell Appellants' complaint, particularly under the facts alleged in Paragraph 136. And, in a February 9, 2006 affidavit, Lawrence Pedley stated:

> At the request of Martin Twist, a long time friend and an occasional client, I was asked to serve as a character witness. I agreed to do so and the statement was videotaped. I made those statements in my personal capacity, not acting as the attorney for Cherokee or any other entities. At the time I made the statements, I had done zero securities work for Twist or anyone else for a period of at least ten years, and to date still have not. Twist came to me and asked me to do securities work for him and I told him that I was no longer current, and that he was going to have to go another [sic] firm, which he did. I have never been general counsel of any entity affiliated with Mr. Twist and in the character reference I gave for him, I did not represent myself as general counsel.

Pedley, PZGOP, and the Coldwell Appellants subsequently transferred venue of their portion of the California suit to the Jefferson Circuit Court in Kentucky. The parties later agreed to arbitrate the balance of their dispute

under the purview of Kentucky's Uniform Arbitration Act (KUAA), Kentucky Revised Statutes (KRS) 417.045, *et seq*.[3] To this effect, the Jefferson Circuit Court entered an agreed order on January 31, 2008, stating: "Upon agreement of the Parties to arbitrate this matter which is further reflected in the Parties' Agreement, this action is dismissed as settled. The Court will retain jurisdiction if necessary to enforce the Parties' Settlement Agreement." Following a brief period of motion practice, the circuit court entered another agreed order on June 20, 2008. In particular, that agreed order states:

> Lawyers Mutual Insurance Company of Kentucky (LMIC) maintains a legal services malpractice insurance policy with respect to PZG[O]P (the "Policy"). See Exhibit B. To the extent that the parties to the Settlement Agreement prevail in the Arbitration with respect to claims for malpractice as alleged in the California Action during the applicable policy period (the "Malpractice Claims"), the parties to the Settlement Agreement and LMIC, through the undersigned counsel, have agreed that coverage will be provided as described in the Policy with respect to Malpractice Claims respecting any PZG[O]P attorney's or employee's malpractice even though that attorney or employee is not explicitly named as a party to the Arbitration or the California Action.

Thereafter, this matter was submitted to arbitration. On September 27, 2009, the arbitrator rendered an award. The arbitrator's award only listed the names of each of the Coldwell Appellants; an amount that PZGOP was required to pay each of the Coldwell Appellants; an amount that the Pedley Estate was required to pay each of the Coldwell Appellants; recitations regarding judgment

[3] Lawrence Pedley passed away on or about April 15, 2007. Subsequently, his estate participated in the arbitration.

interest and the division of arbitration fees; and the qualification that "Except as provided below relating to the costs of this arbitration, all further prayers for judgment are [d]enied." The aggregate of the sums assessed to PZGOP was approximately $642,397.76, and the aggregate of the sums assessed to the Pedley Estate was $674,844.35. The award also recites: "This Award is in full settlement of all claims submitted by the parties."

Significantly, however, the award excludes any mention of the claims submitted by the parties. It also fails to identify the basis for any of the sums awarded, and it does not hold the Pedley Estate and PZGOP jointly liable. Moreover, the award does not include findings of fact, conclusions of law, or any other explanation for the arbitrator's decision and awards.[4]

Nevertheless, on October 15, 2009, the Coldwell Appellants moved the circuit court, per KRS 417.150 and 417.200, to confirm the arbitration award and convert it into an enforceable judgment against the Pedley Estate and PZGOP.

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[4] The only explanation for this result is contained in a pleading that the Coldwell Appellants filed in this matter on January 5, 2010. The pleading asserts:

> Coldwell Defendants/Intervening Defendants admit that an arbitration award was entered against Lawrence Pedley's Estate in the amount of $674,844.35. Coldwell Defendants/Intervening Defendants . . . specifically deny that there is a "record" of the arbitration proceedings. PZG[O]P and the Estate of Lawrence Pedley's respective counsel objected to there being any "record" of the arbitration proceedings and Arbitrator Gambill entered an Order that the transcript of the proceedings was not a record and could not be cited; therefore, there is no official record that can be used in any subsequent proceedings and, furthermore, PZG[O]P and the Estate of Lawrence Pedley's respective counsel also objected to Arbitrator Gambill entering any findings of fact or conclusions of law in the arbitration proceedings.

And, on December 14, 2009, the circuit court granted leave to allow Lawyers Mutual Insurance Company of Kentucky ("LMICK"), the malpractice insurance carrier for both the Pedley Estate and PZGOP, to join itself to this matter as an intervening plaintiff and file a complaint for a declaration of rights, per KRS 418.040. In its intervening complaint, LMICK pointed out that the Coldwell Appellants had alleged claims against the Pedley Estate and PZGOP arising from conduct that LMICK deemed was covered under the purview of the insurance contract,[5] but that the Coldwell Appellants had also asserted claims against the Pedley Estate and PZGOP sounding in fraud and also arising from Pedley's individual conduct as a business promoter, *i.e.*, what Pedley had described in his affidavit as his role as a "character witness" for Twist in his personal capacity as Twist's friend, unrelated to the provision of legal services.

Consequently, LMICK's intervening complaint requested that the circuit court amend and interpret the arbitration award to reflect that 1) the portion of the arbitration award relating to PZGOP related only to malpractice; and that 2) the portion of the award relating to the Pedley Estate related only to fraudulent conduct or "business promoter" conduct that fell outside the scope of the insurance contract and was thus non-compensable.

Apparently concerned that the circuit court might not obligate LMICK to provide the Pedley Estate with coverage, the Coldwell Appellants sought leave to file a CR 14.01 third party complaint. Their complaint sought to 1) join several

[5] A January 20, 2010 order from the circuit court recites that LMICK paid the entirety of the Coldwell Appellants' award against PZGOP.

former members of Pedley's law firm as defendants; and 2) ask the circuit court to determine, per Supreme Court Rule (SCR) 3.024, whether these former members would be jointly and severally obligated to pay the Pedley Estate's liabilities under the arbitration award if LMICK was found to have no obligation to do so.

In a final and appealable order of January 20, 2010, the circuit court denied the Coldwell Appellants leave to file their third party complaint. In justifying its decision, the circuit court stated only that "As a result of the order of January 31, 2008, the Court only retained jurisdiction if necessary to enforce the parties' settlement agreement which mandated the binding arbitration." However, in that same order, the circuit court confirmed the arbitration award.[6]

On January 29, 2010, the Coldwell Appellants filed their notice of appeal.

ANALYSIS

The sole issue that the Coldwell Appellants have raised on appeal is whether the trial court abused its discretion when it denied them leave to file a CR 14.01 third party complaint relating to SCR 3.024. In their brief, they summarize their argument:

> The trial court should have read the Appellants' motion, determined whether impleading the Pedley firm partners unduly complicated the case, was prejudicial to any party, eliminated duplicitous costs, was timely, or was filed for nefarious purposes. Instead, the trial court skipped this step and, in direct contrast to its ruling on LMICK's motion to intervene and intervening complaint, denied the Appellants' motion based on the court's

[6] *See* footnote 2.

> interpretation of an Order and settlement agreement from 2008. The court's failure to apply the appropriate sound legal principles, and uniformly administer rulings, and its arbitrary denial of Appellants' motion, all lead to the inescapable conclusion that the trial court abused its discretion.

Nevertheless, we find that the circuit court correctly concluded that it had no jurisdiction to entertain the Coldwell Appellants' third party complaint.

By its own terms, SCR 3.024 only relates to acts, errors, and omissions arising out of the performance of professional legal services. For the Coldwell Appellants' declaratory action relating to SCR 3.024 to have had any chance of success, the circuit court would have been required to clarify whether the arbitration award against the Pedley Estate arose from conduct relating to the performance of professional legal services. Thus, the Coldwell Appellants' proposed action would have asked the circuit court to engage in additional fact finding in order to amend and clarify the meaning, and thus the merits, of the arbitration award.

However, a circuit court's authority to amend or clarify an arbitrator's award is expressly limited by statutory fiat, specifically KRS 417.130 and 417.170.[7] In relevant part, KRS 417.130 provides:

[7] The Coldwell Appellants' proposed CR 14.01 action is derivative of LMICK's declaratory action and similarly asks for a declaration of rights, specifically, whether and to what degree SCR 3.024 could hold additional PZGOP partners liable for paying the damages that the Pedley Estate owes the Coldwell Appellants, per the arbitration award. Thus, by its own terms, it is based upon Kentucky's Declaratory Judgment Act, KRS Chapter 418.

However, KRS Chapter 418 cannot provide the circuit court with the authority to amend or interpret any part of the arbitration award. Kentucky's Uniform Arbitration Act, KRS 417.045 *et seq*., is a special statute clearly intended to provide an exclusive remedy, *i.e.*, it provides the exclusive procedure for the enforcement of all arbitration agreements falling within its purview and also provides the exclusive procedure for the interpretation, confirmation, and

> On application of a party to the arbitrators or, *if an application to the court is pending under KRS 417.150, 417.160 or 417.170*, on submission to the arbitrators by the court under such conditions as the court may order, *the arbitrators* may modify or correct the award upon the grounds stated in paragraphs (a) and (b) of subsection (1) of KRS 417.170, *or for the purpose of clarifying the award*. The application shall be made within twenty (20) days after delivery of the award to the applicant.

(Emphasis added.)

In relevant part, KRS 417.170 provides:

> (1) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> > (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
> >
> > (b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
> >
> > (c) The award is imperfect in a matter of form, not affecting the merits of the controversy.
>
> (2) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. *Otherwise, the court shall confirm the award as made*.

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enforcement of any resulting arbitration awards. And, where a special statute is clearly intended to provide an exclusive remedy, relief under Kentucky's Declaratory Judgment Act, KRS Chapter 418, is not available. *Iroquois Post No. 229, Am. Legion v. City of Louisville*, 279 S.W.2d 13, 14 (Ky. 1955); *see also, City of Pikeville v. Pike County*, 297 S.W.3d 47, 52 (Ky. App. 2009); *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 484 (Ky. 2009).

(Emphasis added.)

Even if KRS 417.170 had been invoked in this matter, this statute provides the circuit court with no authority to modify or correct any part of the arbitrator's award under the circumstances of this case. It only permits the circuit court to do so, in limited fashion, prior to confirming the award. Here, the circuit court has already confirmed the arbitration award by virtue of its January 20, 2010 order, and no party appealed that part of the circuit court's order.

Per KRS 417.130, the Coldwell Appellants should have applied to the arbitrator to clarify which parts of his award related to professional legal services and which parts of that award reflected conduct relating to Lawrence Pedley's individual conduct as a "business promoter."[8] But, that option is now similarly foreclosed. KRS 417.130 only allowed the parties to make such an application within twenty days of receiving the arbitration award, and only allows the circuit court to do so "if an application to the court is *pending* under KRS 417.150, 417.160 or 417.170[.]" *Id*. (Emphasis added.) Here, since receiving the arbitration award in 2009, the Coldwell Appellants have filed no such application. Additionally, the circuit court cannot remand this matter for the arbitrator to make these findings because no applications under KRS 417.150, 417.160, or 417.170 are pending before the circuit court and, as noted above, the circuit court has already confirmed the arbitration award.

[8] Even the court could have applied to the arbitrator to clarify his award, but it did not do so. KRS 417.130.

In *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978), the former Court of Appeals stated: "When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy."

The reasoning of *Flood* holds equally true to this matter. If the Coldwell Appellants wished for additional findings regarding the substance of the arbitration order, including what part of the awarded amounts represented damages relating to professional legal services, their only recourse was to invoke the procedure that would have allowed them to request those findings from the arbitrator. That procedure arises from statute and, as such, requires strict compliance. *Id.*; *see also Belsito v. U-Haul Co. of Kentucky*, 313 S.W.3d 549, 551 (Ky. 2010). After the Coldwell Appellants failed to follow those procedures and the circuit court confirmed the arbitration award, the circuit court no longer had the jurisdiction to make even the superficial modifications to the arbitration award allowed under KRS 417.170 and further lacked any jurisdiction to remand this matter to the arbitrator for additional findings affecting the merits of the award.

Stated differently, the circuit court had no jurisdiction to entertain the Coldwell Appellants' CR 14.01 complaint simply because it had no jurisdiction to answer the essential question posed by that complaint, namely, whether any part of the amount that the arbitrator awarded against the Pedley Estate arose from

Lawrence Pedley's conduct in providing professional legal services, versus his individual conduct as a "business promoter." The Coldwell Appellants have a judicially confirmed arbitration award against the Pedley Estate for approximately $674,844.35, but the underlying basis of that award is unknown. The only mechanisms that might have allowed a tribunal to clarify the basis of the arbitration award were KRS 417.130 and 417.170, but the Coldwell Appellants sought no recourse under either statute. As such, neither the circuit court, nor this Court, is capable of granting the Coldwell Appellants the relief they seek.

CONCLUSION

For these reasons, the decision of the Jefferson Circuit Court is hereby AFFIRMED.

ALL CONCUR.

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