

RENDERED: SEPTEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001630-MR

HQM OF PIKEVILLE, LLC
D/B/A PIKEVILLE HEALTH
CARE CENTER; HOME QUALITY
MANAGEMENT, INC.; HEALTHCARE
ACQUISITIONS, INC.; LP PIKEVILLE,
LLC D/B/A PIKEVILLE HEALTH CARE
CENTER N/K/A SIGNATURE HEALTHCARE
OF PIKEVILLE; LPMM, INC.; LP MANAGER,
LLC; LP O HOLDINGS, LLC; SIGNATURE
CONSULTING SERVICES, LLC.; SIGNATURE
CLINICAL CONSULTING SERVICES, LLC;
AND LINDA DAMRON

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 09-CI-00622

SHERRY COLLINS, BOTH AS
ADMINISTRATRIX OF THE
ESTATE OF MYRTIE CHANEY,
DECEASED; AND ON BEHALF
OF THE WRONGFUL DEATH
BENEFICIARIES OF MYRTIE
CHANEY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellants¹ (hereinafter collectively referred to as “the nursing home”) appeal from the Pike Circuit Court order which denied the nursing home’s motion to compel arbitration against Sherry Collins, as administratrix of the estate of Myrtie Chaney, deceased, and on behalf of the wrongful death beneficiaries of Myrtie Chaney (hereinafter collectively referred to as “the estate”). For the following reasons, we reverse the order and remand this case for further proceedings.

The estate commenced this action against the nursing home in May 2009, asserting various claims related to the nursing home’s actions towards Myrtie Chaney during her residency. The nursing home moved to compel arbitration under Kentucky’s version of the Uniform Arbitration Act (“KUAA”) (KRS² 417.045-240) and the Federal Arbitration Act (“FAA”) (9 U.S.C.³ § 1 et seq.) pursuant to a written agreement executed between itself and Collins, granddaughter of Myrtie Chaney. The trial court denied the motion to compel arbitration on the

¹ HQM of Pikeville, LLC d/b/a Pikeville Health Care Center; Home Quality Management, Inc.; Healthcare Acquisitions, Inc.; LP Pikeville, LLC d/b/a Pikeville Health Care Center n/k/a Signature HealthCARE of Pikeville; LPMM, Inc.; LP Manager, LLC; LP O Holdings, LLC; Signature Consulting Services, LLC; Signature Clinical Consulting Services, LLC; and Linda Damron.

² Kentucky Revised Statutes.

³ United States Code.

basis that the court lacked subject matter jurisdiction over the agreement under *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). This appeal followed.

On appeal, the nursing home claims that the agreement reasonably provides for arbitration to take place in Kentucky, as required by the KUAA; the language in *Ally Cat* relied upon by the trial court is not binding; and alternatively, if jurisdiction does not exist under the KUAA, then the agreement is by its express terms governed by the FAA. We find that the holding in *Ally Cat* precludes jurisdiction under the KUAA, but that the FAA could supply the trial court with jurisdiction. Thus, we remand this case for the trial court to address the applicability of the FAA to the agreement.

As an initial matter, this court has jurisdiction to review an appeal from an otherwise interlocutory order denying a motion to compel arbitration. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001) (citing KRS 417.220). We review a trial court's findings of fact in an order denying enforcement of an arbitration agreement to determine if the findings are clearly erroneous, but we review a trial court's legal conclusions under a *de novo* standard. *Id.*

In this case, the trial court determined that it lacked subject matter jurisdiction over the agreement, relying on the following language of the holding in *Ally Cat*:

Subject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state. Thus, an

agreement to arbitrate which fails to include the required provision for arbitration within this state is unenforceable in Kentucky courts. . . . When the issue arises prior to the arbitration hearing . . . and the agreement upon which arbitration is sought fails to comply with the literal provisions of KRS 417.200, the courts of Kentucky are, pursuant to KRS 417.200, without jurisdiction to enforce the agreement to arbitrate.

Id. at 455-56.

KRS 417.200 is part of the KUAA and addresses jurisdiction of Kentucky courts. It provides:

The term “court” means any court of competent jurisdiction of this state. The making of an agreement . . . **providing for arbitration in this state** confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder.

KRS 417.200 (emphasis added).

The parties do not dispute that the agreement in this case does not expressly provide for arbitration to occur in Kentucky. However, the nursing home contends that the agreement “reasonably provides” for arbitration to take place in Kentucky by stating that arbitration is to be conducted “at a location agreed upon by the parties, or in accordance with the Code of Procedure of NAF [National Arbitration Forum].” In other words, the nursing home argues that when applied, the agreement not only “provides” Kentucky as an arbitration forum, but effectively precludes any other forum since the parties are Kentucky residents and the events giving rise to this lawsuit occurred in Kentucky.

In *Ally Cat*, the Kentucky Supreme Court rejected the argument that an agreement to arbitrate satisfies KRS 417.200 so long as it does not compel arbitration to take place outside of this state. *Id.* at 455. In the case at bar, we do not believe that the language of the agreement stating that arbitration is to be conducted “at a location agreed upon by the parties, or in accordance with the Code of Procedure of NAF” satisfies the requirement of KRS 417.200 so as to confer jurisdiction upon Kentucky courts. Furthermore, we find wholly unpersuasive the nursing home’s assertion that the aforementioned holding in *Ally Cat* is mere dicta and not legally binding.

However, the nursing home additionally argues that if the holding in *Ally Cat* precludes enforcement of the agreement under the KUAA, then that portion of the agreement is severed and the FAA exclusively applies, according to the following provision of the agreement:

If any portion of this Arbitration Agreement is determined to be unenforceable, such provision shall be deemed to be severed and deleted and any such severance or deletion shall not affect the validity and enforceability of the remaining provisions of the Arbitration Agreement.

This agreement shall be governed by and interpreted under the Federal Arbitration Act found at 9 U.S.C. Sections 1-16.

Recently, the Kentucky Supreme Court clarified its holding in *Ally Cat*, stating “*Ally Cat* has no applicability to an arbitration agreement governed exclusively by the Federal Arbitration Act.” *Ernst & Young, LLP v. Clark*, 323

S.W.3d 682, 687 n.8 (Ky. 2010). *See also North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 n.2 (Ky. 2010) (the FAA is enforceable in state and federal court) (citations omitted). Since we have determined the portion of the agreement stating that arbitration is to be conducted “at a location agreed upon by the parties, or in accordance with the Code of Procedure of NAF” does not confer jurisdiction upon Kentucky courts, that portion of the agreement is severed pursuant to the aforementioned severability clause and the FAA exclusively governs, if applicable.

The Kentucky Supreme Court has held that the FAA applies “to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce.” *Fite and Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729, 734 (Ky. 1977); *see also Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984). Because the trial court did not consider the applicability of the FAA, i.e., whether the arbitration agreement was “a contract evidencing a transaction involving interstate commerce,” and instead disposed of the motion to compel arbitration on jurisdictional grounds, we believe remand is appropriate in order for the trial court to make the necessary findings of fact and conclusions of law related to this issue.

The order of the Pike Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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