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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001388-MR

JAMES ELI ADAMS — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CI-00283

DANIEL C. HICKS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: James Eli Adams appeals confirming an award granted by the Kentucky Bar Association (KBA) Arbitration Panel in favor of attorney, Daniel C. Hicks. He contends: (1) the Christian Circuit Court lacked subject matter jurisdiction to confirm or vacate the arbitration award because the arbitration agreement did not explicitly specify Kentucky as the choice of forum for arbitration; (2) the standard fee dispute arbitration agreement provided by the KBA

is unconscionable; and (3) the trial court erroneously permitted Hicks to attach an attorney's lien to inheritance proceeds from Adams's father's estate. Prior to filing his brief, Hicks filed a motion to dismiss for failure to comply with Kentucky Rules of Civil Procedure (CR) 76.03. We deny the motion to dismiss, but affirm the Christian Circuit Court's order confirming the KBA Arbitration Panel's order.

In January 2007, Adams hired Hicks to settle his father's estate. After the attorney-client relationship deteriorated in 2008, Hicks withdrew from representing Adams.

The estate was settled and the proceeds were available to distribute to the heirs. In 2010, Hicks filed a motion to intervene in the estate action requesting a lien against Adams's portion of the estate proceeds for his outstanding attorney fees. Hicks was permitted to intervene and a lien was issued in the amount of $20,000 plus interest against Adams's portion of the estate funds. After all other parties were dismissed from the action, the fee dispute between Adams and Hicks was the only remaining issue.

Over the ensuing two years, Adams and Hicks attempted to settle the fee dispute and, after those attempts failed, Adams petitioned the KBA for arbitration. Adams and Hicks executed a one and one-half page preprinted form drafted by the KBA entitled "Agreement to Arbitrate Fee Dispute." In addition to certifying that their good faith efforts to resolve the fee dispute failed, the parties agreed to "arbitration by the Kentucky Bar Association's Legal Fee Arbitration Panel under the provisions of Rule 3.810 of the Supreme Court of Kentucky." The

agreement expressly states: "All parties have read Rule 3.810 of the Supreme Court of Kentucky and understand its provisions." The parties agreed the Kentucky Uniform Arbitration Act (KUAA) and the agreement "shall govern and determine the effect and enforcement of the decision and award."

Kentucky Supreme Court Rule (SCR) 3.810(1) states its purpose is to "establish a procedure whereby fee disputes arising from attorney and client relationships may be resolved by submission to binding arbitration." SCR 3.810 (6) provides that arbitration hearings "shall be held in a county that reasonably limits the travel required by the parties to attend the hearing." Pursuant to the dictates of that rule, in March 2012, the KBA Arbitration Panel heard the parties' fee dispute at a location in Madisonville, Kentucky. The panel awarded Hicks attorney fees in the amount of $23,035.

Hicks filed a motion to confirm the award in the Christian Circuit Court, and Adams, represented by counsel, filed a motion to vacate the award. Because Adams's counsel filed a motion to withdraw as counsel, the matter was not heard until February 6, 2013. Adams's newly retained counsel indicated there were no issues to be decided that necessitated a "trial."

Subsequently, Adams's counsel moved to withdraw. The motion was granted on April 4, 2013, and Adams was permitted until April 30, 2013, to retain new counsel. On May 1, 2013, Hicks filed a renewed motion to confirm the arbitration award.

At a scheduled hearing on May 15, 2013, neither Adams nor counsel on his behalf appeared. On the same date, the court issued an order and judgment reciting that it understood Adams's counsel's statement at the February 6, 2013, hearing to constitute a withdrawal of the motion to vacate the arbitration award. The trial court confirmed the award and granted a judgment in favor of Hicks against Adams in the amount of $23,035 bearing interest at 8% until the date of judgment. The court further ordered the funds held by the Clerk of the Christian Circuit Court in the amount of $28,936.49, plus accumulated interest, to be distributed to Hicks in partial satisfaction of the judgment.

After the court recessed, it was discovered Adams sent a fax requesting additional time to obtain counsel. The trial court then issued an order placing the May 15, 2013, order and judgment in abeyance and scheduling a status conference for June 12, 2013.

Hicks then filed a motion requesting the trial court reconsider and set aside its order placing the May 15, 2013, order in abeyance. After ruling on the motion was passed on several occasions, it was heard on August 5, 2013, at which time Adams was represented by counsel. The court issued a calendar order stating: "Award signed by all panel members to be made part of the record. Stay lifted. 10 days before distribution." From that order, Adams filed a notice of appeal and a motion to waive supersedeas bond. Because no bond had been filed, the clerk distributed the funds held by it in compliance with the May 15, 2013, order and judgment and Hicks issued a non-wage garnishment.

We first address Hicks's motion to dismiss on the issues that the trial court's August 5, 2013 order was not final and appealable. By removing the May 15, 2013, order and judgment from abeyance, the trial court resolved all outstanding motions and confirmed the award. An order confirming or denying an arbitration award is final and appealable as is any judgment entered pursuant to the provisions of KUAA. KRS 417.220 (c) and (f). Although Hicks faults Adams's appellate prehearing statement for not specifically referencing the May 15, 2013, order and judgment, we follow the rule of substantial compliance. In *Capital Holding Corp. v. Bailey,* 873 S.W.2d 187, 197 (Ky. 1994), the Court held "failure to observe strict compliance with CR 76.03 is not jurisdictional." Therefore, "the question is one of substantial compliance[.]" *Id*. We conclude Adams's prehearing statement substantially complied with the rule by clearly stating the issues. We now address the merits of Adams's appeal.

The KUAA is contained in KRS Chapter 417. KRS 417.150 provides, in part, "[U]pon application of a party, the court shall confirm an award[.]" Under the KUAA, "court" is defined as "any court of competent jurisdiction of this state." KRS 417.200. The Act provides: "The making of an agreement described in KRS 417.050 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." *Id*. (emphasis added). Adams argues because the arbitration agreement did not expressly state arbitration was to occur in Kentucky, the arbitration award is not enforceable by a Kentucky court.

He relies on a string of Kentucky cases beginning with *Tru Green Corp. v. Sampson*, 802 S.W.2d 951 (Ky.App. 1991). In *Tru Green,* the Court considered the Jefferson Circuit Court's jurisdiction to enforce an arbitrator's award rendered outside the Commonwealth following a hearing also outside the Commonwealth pursuant to an arbitration agreement expressly stating the arbitration was to be held outside the Commonwealth. *Id*. at 952. The Court unequivocally held:

> The plain meaning of [KRS 417.200] statute is that the agreement, wherever made, must provide for the *arbitration itself* to be in the Commonwealth in order to confer subject matter jurisdiction on a Kentucky court; at that point, one looks to Kentucky Constitution § 112(5) and KRS 23A.010 to determine that the circuit court is the court of competent jurisdiction of this state.

Id. at 953.

This Court again addressed the issue in *Artrip v. Samons Constr., Inc*., 54 S.W.3d 169 (Ky.App. 2001), where the arbitration was held in Ohio pursuant to an arbitration agreement that did not designate a specific location for the arbitration. The Court disagreed *Tru Green* was distinguishable based on the differing language in the arbitration agreements regarding the location of arbitration and reiterated the teachings of the *Tru Green* Court:

> [T]he arbitration agreement committed the grievous omission of failing to designate a situs in Kentucky for the arbitration to take place, a step critical to conferring subject matter jurisdiction over the arbitration upon a Kentucky court. This is the lesson of *Tru Green, supra:* that the source of the court's jurisdiction to act in arbitration matters is wholly derived from the Uniform Arbitration Act. The failure of the parties to comply with the critical provision of naming a site in Kentucky in their

> original agreement (even if they later agreed to a site in Ohio) was fatal to their ability to invoke the jurisdiction of a Kentucky court to enforce a subsequent arbitration award.

Id. at 172.

In *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455 (Ky. 2009), our Supreme Court held "[T]he Court of Appeals in *Tru Green* and *Artrip* got it right…. [A]n agreement to arbitrate which fails to include the required provision for arbitration within this state is unenforceable in Kentucky courts."[1] The Court determined a clause in the arbitration agreement stating it was governed by the KUAA was not equivalent to a statement that arbitration was to occur in Kentucky. *Id*. As this Court would later explain in *Padgett v. Steinbrecher*, 355 S.W.3d 457, 462 (Ky. App. 2011):

> Merely referencing Kentucky in an arbitration clause is insufficient to confer jurisdiction. As clearly elucidated by our Supreme Court, the arbitration clause must specifically and unequivocally provide for arbitration in this Commonwealth.

As the court noted, choice of law provisions are not forum-selection or venue clauses designating Kentucky as the state where arbitration must proceed. *Id*. However, the arbitration agreement in this case contains a choice-of-law provision and a forum-selection clause.

[1] *Ally Cat* does not apply to an arbitration agreement governed exclusively by the Federal Arbitration Act. *Ernst & Young, LLP v. Clark,* 323 S.W.3d 682, 687 n8 (Ky. 2010). No contention is made that the agreement in this case is governed by that Act.

The agreement provides arbitration is to be governed by the KUAA *and* expressly provides arbitration is to be governed by SCR 3.810. SCR 3.810(6) is a forum-selection provision and, in that respect, distinguishes this case from *Tru Green*, *Artrip*, *Ally Cat* and *Padgett*.

Although the rule does not state the county must be in Kentucky, the Supreme Court of Kentucky and the KBA are entities that exist by authority of the Kentucky Constitution and the Rules of the Supreme Court and have jurisdiction only within Kentucky. It would simply be absurd to construe the term "county" to include a county other than one located in Kentucky. By the terms of the agreement, Adams acknowledged he read and understood SCR 3.810, including its provision that arbitration would take place in a Kentucky county. We conclude the arbitration award was enforceable in the Christian Circuit Court.[2]

Adams argues that even if Kentucky has jurisdiction to enforce the award, it is not enforceable because the arbitration agreement is unconscionable. He claims the arbitration did not describe or define the nature of a fee dispute and that he believed arbitration would encompass the professional adequacy of Hicks's legal representation and any alleged misconduct. He notes the arbitration panel refused to consider Hicks's allegations of professional misconduct and malpractice stating these determinations are "for another day and another venue."

[2] In *Ally Cat*, the Court left the question whether an award actually arbitrated in Kentucky would be enforceable even if Kentucky was not designated in the agreement as the state in which arbitration would be conducted. *Ally Cat*, 274 S.W.3d at 456. In *Padgett*, this Court indicated it would be receptive to such a contention under the proper facts. *Padgett*, 355 S.W.3d at 463. Because we are affirming on different grounds, we do not address the issue.

Arbitration agreements are generally favored by the law. However, an unconscionable agreement will not be enforced. The doctrine of unconscionability "is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain." *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341-42 (Ky.App. 2001) (quoting *Louisville Bear Safety Service, Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438, 440 (Ky. 1978)).

Merely because Adams is a layperson and Hicks an attorney does not render the arbitration agreement one-sided. The term "fee dispute" is not a term of art used in the legal profession but is one any reasonable layperson would understand to mean a disagreement over the amount owed to an attorney by a client or former client. Although Adams alleges ignorance of SCR 3.810, he acknowledged he read and understood the rule. Moreover, we cannot overlook that it was Adams who petitioned the KBA to resolve the fee dispute. We conclude the arbitration agreement was not unconscionable.

Adams's final argument is the trial court erred when it permitted Hicks to place an attorney's lien on Adams's portion of estate funds because Hicks did not produce or attain Adams's inheritance.

We conclude the issue is moot. A money judgment was rendered following the enforcement of the arbitration award and the funds dispersed from the estate.

For the reasons stated, the order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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