

RENDERED: JANUARY 15, 2016; 10:00 A.M.
TO BE PUBLISHED

MODIFIED: FEBRUARY 26, 2016; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000385-MR

KATHLEEN IMHOFF

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CI-04069

LEXINGTON PUBLIC LIBRARY
BOARD OF TRUSTEES

APPELLEE

AND

NO. 2014-CA-000490-MR

LEXINGTON PUBLIC LIBRARY
BOARD OF TRUSTEES

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CI-04069

KATHLEEN IMHOFF

CROSS-APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: COMBS, DIXON, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Kathleen Imhoff, former executive director of the Lexington Public Library, appeals from an order of the Fayette Circuit Court entered on February 21, 2014. The order denied, in part, Imhoff's motion to confirm and enforce an arbitration award rendered in her favor on May 17, 2013. The library's board of trustees cross-appeals. Following our review, we vacate the order of the trial court and remand for further proceedings. By separate order, we deny Imhoff's motion to dismiss portions of the cross-appeal.

The material facts of this case are essentially undisputed. In 2003, Imhoff was offered the position of executive director at the library. In June, she executed an employment agreement with the library's board. The agreement provided that the term of her employment would be from July 7, 2003, through June 30, 2006, unless Imhoff was terminated for cause. It further provided that the agreement "may be terminated for any reason by either party by providing thirty (30) days['] written notice." The parties agreed that "[a]ny dispute or difference" between them "shall be finally settled by arbitration in accordance with the Commercial Rules of the American Arbitration Association." They agreed that "[a]ny order or determination of the arbitral tribunal shall be final and binding upon the parties" and "may be entered in any court having jurisdiction."

In June 2007, Imhoff executed a substantially similar employment agreement that provided that the term of her employment would be from July 1, 2007, through June 30, 2011. There is no question that the agreement could be terminated by either party at any time – for any reason – again by providing thirty-days’ written notice.

Imhoff’s employment was terminated by the library board effective August 15, 2009. She was advised by written notice that her termination was *without cause*. Imhoff was paid her salary for a thirty-day period. When the library board indicated that it had no further financial obligation to Imhoff pursuant to the provisions of the employment contract, Imhoff prepared a draft civil complaint and forwarded it to the library board.

The parties attempted unsuccessfully to mediate their dispute in 2010. Imhoff pursued a separate gender discrimination claim through the Equal Employment Opportunity Commission, which issued her a right-to-sue letter.

On July 13, 2010, Imhoff filed an action against the library board in Fayette Circuit Court in which she alleged that the library had breached the parties’ contract by failing to pay her salary and benefits through June 30, 2011. Imhoff also asserted claims of defamation and gender discrimination. She sought to recover approximately \$5 million in damages. She asked for a jury trial.

On August 3, 2010, the library board filed its answer to Imhoff’s complaint. The following day, the library board filed a motion to dismiss the majority of her claims. In a memorandum in support of its motion to dismiss, the library board

contended that the defamation and discrimination claims were subject to dismissal because the library board was entitled to sovereign immunity; because Imhoff had failed to exhaust her administrative remedies relative to the discrimination claim; and because Imhoff's complaint failed to state a claim for discrimination. The library board noted that the issue of its financial obligation to Imhoff with respect to any additional salary and benefits "need[ed] to be decided by the Court, and is not the subject of this motion." Motion at 4. Imhoff agreed to a pretrial conference and a briefing schedule with respect to the pending motion to dismiss.

Approximately six weeks after filing her complaint in Fayette Circuit Court, Imhoff notified the library board that she intended to submit the dispute to arbitration. On September 1, 2010, she filed a motion to stay the litigation pending arbitration of her claims. The library board opposed the motion. In its written response to Imhoff's motion to stay the litigation, the library board argued that Imhoff had unequivocally waived her right to demand arbitration. It contended that by bringing a charge of discrimination with the Equal Employment Opportunity Commission and by filing the legal action in circuit court, Imhoff had affirmatively waived the parties' agreement to submit their dispute to arbitration. The library board reserved the right to assert sovereign immunity as a defense to its alleged liability for breach of the employment contract.

In an order entered September 29, 2010, the Fayette Circuit Court granted Imhoff's motion to stay her breach-of-contract claim pending its resolution through arbitration. The court reserved ruling on the arbitrability of the defamation and

discrimination claims and set a briefing schedule with respect to whether the issue of immunity would be resolved by the court or by the arbitration panel instead.

On November 30, 2011, the Fayette Circuit Court entered an opinion and order dismissing Imhoff's defamation claim as barred by the doctrine of sovereign immunity and granting the library board's motion for summary judgment with respect to her gender discrimination claim.

In an order entered May 24, 2012, the Fayette Circuit Court dismissed Imhoff's contract action in deference to her recourse to arbitration with "leave to seek reinstatement of the action, for the limited purpose, if necessary, of reviewing or enforcing any arbitration decision." On June 20, 2012, nearly three years after her termination had taken effect, Imhoff filed a demand for arbitration with the American Arbitration Association.

In an order signed on February 14, 2013, a divided arbitration panel concluded that the employment agreement provided for a four-year term and that there existed, by implication, an obligation on the part of the library board to continue to pay Imhoff for the period remaining (ending June 20, 2011) on the contract following the termination of her employment. The panel invited the parties to submit briefs with respect to damages, and they did so.

On May 17, 2013, the arbitration panel issued its award and concluded that the library board owed Imhoff \$907,761.55 based upon its breach of the parties' employment agreement. That figure included: \$202,338.80 in pre-judgment interest; \$446,129.75 for lost salary, vacation, health benefits, travel expenses and

professional dues, and diminution in retirement benefits; and \$228,333.00 in consequential damages arising out of “lost opportunities caused by the [library board’s] action....” The library board was also ordered to pay \$19,730.00 for the costs of arbitration and fees.

On May 22, 2013, Imhoff filed a motion in the Fayette Circuit Court to confirm and enforce the orders of the arbitration panel. On June 4, 2013, the library board filed a motion to vacate or to modify the arbitration orders. It argued that the arbitration panel had exceeded its powers and that it had acted in manifest disregard of the law.

In an opinion and order entered on February 21, 2014, the Fayette Circuit Court concluded that the doctrine of sovereign immunity barred the arbitration panel’s award of consequential damages and pre- and post-judgment interest. It vacated that portion of the award. However, the court confirmed the award in favor of Imhoff in the amount of \$256,940.62 – her salary for the remainder of the four-year term. The court did not address the panel’s award of \$19,730.00 in arbitration costs and fees. Imhoff’s appeal and the cross-appeal of the board of trustees followed.

Imhoff contends that the Fayette Circuit Court erred by failing to enforce the arbitration award as it stood and that by so doing, the court effectively created an improper opportunity for the library board to appeal the terms of the arbitration award to the circuit court. She contends that the circuit court erred in its review of the arbitration panel’s decision to grant consequential damages and pre-judgment

interest and by failing to grant her motion for additional pre- and post-judgment interest. Finally, Imhoff contends that the circuit court erred by failing to include the arbitration panel's award of costs and fees to Imhoff in its judgment against the library board. In essence, Imhoff argues that the circuit court had no jurisdiction over the award except to enforce it *in toto*.

On cross-appeal, the library board contends that the circuit court erred by referring the breach of contract issue to arbitration in light of its claim to the defense of sovereign immunity. In the alternative, the library board argues that the circuit court erred by failing to conclude that Imhoff voluntarily waived her right to have her claim decided through the arbitration process as provided by the terms of the employment contract.

In a motion filed with this court on April 24, 2014, Imhoff sought the dismissal of portions of the cross-appeal filed by the library board. She argued that the board failed to file a timely appeal of the circuit court's 2012 decision to dismiss her breach-of-contract action in favor of arbitration. Consequently, she contended that the board is barred from asserting an argument regarding her alleged waiver of the contract's arbitration provision. In response, the library board contended that the circuit court's order compelling arbitration of Imhoff's breach of contract was not final and appealable until entry of its order confirming, in part, the arbitration award. The motion was referred by the court to this panel for resolution.

In *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014), the Supreme Court of Kentucky outlined a procedure governing a court's finding as a matter of state law that there is no arbitration agreement and how to proceed when it then denies the application to compel arbitration. The moving party who has lost the right to compel arbitration may file an immediate appeal under the provisions of Kentucky Revised Statute[s] 417.220 if the agreement is subject to the Kentucky Uniform Arbitration Act. Or it may file an appeal under Kentucky Rule[s] of Civil Procedure (CR) 65.09 if the agreement is subject to the Federal Arbitration Act. However, the court noted that there is no parallel provision in the statutes or the civil rules to allow an objecting party to file an immediate appeal from the order compelling it to submit to arbitration. In such a case, interlocutory relief is unavailable.

In *JPMorgan*, the Supreme Court of Kentucky noted that the circuit court retained the authority to set aside an earlier order compelling arbitration and to void the arbitration proceedings -- even where the proceedings had been pursued to completion. Any appeal of the circuit court's decision to compel arbitration between the parties could only be brought in a direct appeal of the ruling *after a final judgment of the court had been entered* since there is no provision for an interlocutory appeal under the circumstances. Again, only an order **denying** recourse to arbitration is immediately appealable by interlocutory action. The counterpart, the granting of a motion to compel arbitration, is not immediately appealable.

In the cross-appeal, we are asked to review whether the circuit court correctly concluded that Imhoff had not waived her right to arbitration -- despite conduct (filing a civil action) that was apparently inconsistent with an intention to rely on that right. Until the circuit court's final judgment was entered, all of its rulings remained interlocutory and subject to revision. CR 54.02(1) provides as follows:

[A]ny order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The court was free to reconsider, revise, alter, or amend its order referring the parties to arbitration at any time before its final judgment was entered on February 21, 2014. All of the circuit court's interlocutory orders were subject to re-adjudication as of that date. Therefore, the cross-appeal of the library board was rendered timely. The board's identification of the court's final opinion and order enforcing, in part, the arbitration award in its notice of cross-appeal was also sufficient. Consequently, by separate order, we deny Imhoff's motion for sanctions and her motion to dismiss.

In examining the merits of this proceeding, we conclude that the critical issue before us is the library board's contention that Imhoff waived her right to

pursue arbitration when she opted to engage the judicial process by filing a civil action in circuit court.

The parties agree that the arbitration clause at the center of this dispute is a material term of Imhoff's employment agreement. Since arbitration rights are contractual in nature, they may be waived. *Valley Construction Co., Inc. v. Perry Host Mgmt. Co., Inc.*, 796 S.W.2d 365 (Ky. App. 1990). While agreements to arbitrate are "favored" in the law, the right to compel an arbitration proceeding pursuant to the terms of the agreement may be waived by the parties just as any other contractual right may be waived. Waiver of a known right may be express or it may be inferred from a failure to assert or to insist upon recognition of the right. *Barker v. Stearns Coal & Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466 (1942). It is well established that election to participate in a judicial proceeding may act as an implied waiver of the right to compel arbitration where the party seeking arbitration participates in litigation instead of requesting arbitration. *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543 (Ky. 2008).

Whether a party has waived the right to compel arbitration through its participation in litigation is a question of law to be resolved by the court. *Id.*

In the case before us, the circuit court ordered that the civil action commenced by Imhoff be stayed and that the matter be referred to arbitration. Thus, we may infer that the court did not believe that Imhoff had waived her right to compel arbitration despite having invoked the judicial process. Because the

court's decision was a matter of law, our review is *de novo*. *Jackson v. Mackin*, 277 S.W.3d 626 (Ky. App. 2009).

Imhoff was terminated from her position with the library effective August 15, 2009. She was aware of the arbitration clause included in the employment agreement since the terms of that agreement lie at the very heart of this dispute. Nevertheless, Imhoff sought to pursue legal action against the library board. She forwarded a draft complaint to the library board shortly after her termination. And she pursued an administrative claim through the Equal Employment Opportunity Commission to secure a right-to-sue letter from that agency. On July 13, 2010, Imhoff did, in fact, commence the threatened legal action against the library board in Fayette Circuit Court. In her complaint, Imhoff did not refer to the arbitration provision included in the contract. Instead, she demanded a trial by jury. Imhoff's decision to invoke the judicial process is clearly at odds with an intention to assert her arbitration rights.

In *Jackson v. Mackin, supra*, Jackson was the purchaser of real property under a contract that included an arbitration provision. We held that Jackson had waived her right to arbitration solely by electing to file a complaint against the seller in circuit court. This holding was based upon the fact that inclusion of an arbitration clause is meant to give the parties *the choice of an alternative, non-judicial forum* in which to resolve their disputes -- not to encourage sequential or serial proceedings in multiple forums.

In this case, Imhoff seeks to avoid our holding in *Jackson* by contending that she really “had no choice” but to file the underlying litigation in order to avoid a statute-of-limitation defense with regard to her discrimination claim. We reject this contention.

In *Am. Gen. Home Equity v. Kestel, supra*, the Supreme Court of Kentucky was faced with a similar argument. The Court concluded that a lender’s decision to file a foreclosure action in circuit court *was not* “clearly inconsistent with an intent to seek arbitration” -- but *only* because Kentucky, as a judicial foreclosure state, *requires* the filing of a circuit court action in order to **pursue foreclosure as a remedy**. Furthermore, the court observed that the lender had given notice “early and often that in its view, it at least potentially had the right to pursue arbitration and might choose to do so.” *Id.* at 554. These distinguishing factors are absent from the matter before us.

If Imhoff had ever been concerned that the library board would fail to honor its agreement to arbitrate the dispute between them, she was at liberty to make application with the court, pursuant to the provisions of KRS 417.060, for an order directing the parties to proceed with arbitration. Instead of filing her civil action in Fayette Circuit Court, Imhoff could have demanded arbitration pursuant to the terms of the contract and according to the procedure outlined by our statutes.

Instead, following her termination, Imhoff rejected her right to arbitration and elected to pursue the judicial process without any expression of an intention to reserve her right to seek later recourse to arbitration. She notified the media that

she would file a legal action against the library board; she tendered to it a draft complaint suggesting that legal action against the board was imminent; and she secured a right-to-sue letter from the Equal Employment Opportunity Commission. For more than a year, Imhoff indicated, unequivocally -- and again, without reservation of her right to pursue arbitration -- that she intended to pursue her claims against the library board in court. Imhoff failed to take the necessary procedural and statutory steps to enforce her contractual right to compel arbitration. Instead, she voluntarily waived the right to arbitration guaranteed by the terms of her employment contract and elected instead to pursue a civil action in circuit court.

Again, in *Jackson v. Mackin, supra*, we held that a party's single act of filing a complaint, ***with nothing more***, constituted an unequivocal waiver of an arbitration clause in the parties' contract. The court's consideration of the timeliness of a party's assertion of a right to arbitration arises only where a ***defendant*** is drawn into litigation, participates to some degree with the proceedings in that forum, then suddenly objects to the litigation. In *Am. Gen. Home Equity v. Kestel, supra*, the Supreme Court of Kentucky concluded that the conduct of a defendant in litigation commenced against it was not inconsistent with an intention to exercise its arbitration rights where it asserted arbitration rights as an affirmative defense in its answer and counterclaim and pursued those rights early in the litigation.

As the plaintiff, Imhoff suddenly changed course and decided in August 2010 to stay the litigation that she had commenced against the library board and instead to submit the parties' dispute to arbitration. The library board objected immediately. It argued strenuously to the trial court that Imhoff had already affirmatively waived her right to demand the arbitration. We agree.

We do agree with Imhoff that once the arbitration award had been entered, the trial court had little latitude to evaluate the substance of the award. *See* KRS 417.160. However, that argument is moot under the specific facts of this case. We conclude that the trial court erred by ruling that Imhoff had not waived her right to arbitrate the dispute between the parties. It was incumbent upon the court to set aside its earlier order compelling arbitration to void the arbitration proceedings in their entirety, and to proceed with the litigation of this case in the judicial forum that Imhoff herself had elected.

We vacate the opinion and order of the Fayette Circuit Court confirming, in part, the arbitrators' award, and we remand this case for further proceedings. By separate order, we deny Imhoff's motion to dismiss portions of the cross-appeal.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Richard A. Getty
Jessica Winters
Matthew W. English
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLANT/CROSS-
APPELLEE:

Richard A. Getty
Lexington, Kentucky

BRIEF FOR APPELLEE/
CROSS-APPELLANT:

Keith Moorman
Ashley Ward
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEE/CROSS-
APPELLANT:

Keith Moorman
Lexington, Kentucky