RENDERED: AUGUST 9, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000769-MR

JAMES JOHNSON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 17-CI-005465

ARMSTRONG TRANSFER & STORAGE COMPANY, INC./ARMSTRONG RELOCATION COMPANY; UNITED VAN LINES, LLC; AND MAYFLOWER TRANSIT, LLC APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND L. THOMPSON, JUDGES.

DIXON, JUDGE: James Johnson appeals from the Jefferson Circuit Court's April 24, 2018, order dismissing his complaint against Armstrong Transfer & Storage Company, Inc./Armstrong Relocation Company; United Van Lines, LLC; and

Mayflower Transit, LLC (collectively, "Armstrong"), and directing Johnson to submit any claims he chooses to pursue against Armstrong to arbitration. After careful review of the record, briefs, and the law, we vacate and remand.

On December 11, 2014, Johnson and Armstrong entered into an Independent Contractor Operating Agreement ("ICOA"). In pertinent part, the ICOA provides:

> 99. GOVERNING LAW. This Agreement is to be governed by the laws of the United States and, except as otherwise provided herein, the State of Kentucky, including the choice-of-law rules of such State. COMPANY and CONTRACTOR hereby consent to the jurisdiction of the state and federal court of Kentucky.
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> 100. DISPUTE RESOLUTION
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> > 100(a). Arbitration Required for All Disputes. Any dispute (including a request for preliminary relief) arising in connection with or relating to this Agreement, its terms, or its implementation, including any allegation of tort or of breach of this Agreement or of violations of the requirements of any applicable government authorities, whether local, state, federal, or foreign, including but not limited to the federal leasing regulations (49 C.F.R.[1] Part 376), shall be fully and finally resolved by arbitration in accordance with (1) the Commercial Arbitration Rules (and related arbitration rules for preliminary relief) of the American Arbitration Association ("AAA"); (2) the Federal Arbitration Act (ch. 1 of tit. 9 of United States Code, with respect to which the

[1] Code of Federal Regulations.

> parties agree that this Agreement is not an exempt "contract of employment") or, if the Federal Arbitration Act is held not to apply, the arbitration laws of the State of Missouri; (3) and the procedures set forth below.

(Footnote added.) Above the signature lines the ICOA provides, "**THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION THAT MAY BE ENFORCED BY THE PARTIES**."

On October 16, 2017, Johnson filed a verified complaint in Jefferson Circuit Court for injunctive relief and damages alleging breach of contract, violations of 49 C.F.R. Part 376, promissory estoppel, fraud/misrepresentation, and breach of covenant of good faith and fair dealing, and requesting punitive damages. Armstrong moved the trial court to dismiss Johnson's complaint pursuant to CR[2] 12.02(a) for lack of subject matter jurisdiction and to compel arbitration pursuant to the ICOA. Johnson responded, asserting that pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C.[3] §§ 1-16, and Kentucky law, the ICOA is not subject to arbitration. Armstrong replied, contending that Johnson was not an "employee," but, rather, an independent contractor; therefore, neither federal nor state law—relying on Missouri law pursuant to the ICOA—precluded

[2] Kentucky Rules of Civil Procedure.

[3] United States Code.

arbitration. The trial court entered its brief order—which contained no findings of fact[4]—dismissing Johnson's complaint and directing him to submit to arbitration should he wish to pursue his claims against Armstrong. This appeal followed.

On appeal, Johnson raises two sets of arguments. First, Johnson argues that Armstrong cannot enforce the arbitration clause against him under federal law because independent contractors in the transportation industry are exempt from the FAA or, alternatively, it is a disputed material fact whether Johnson was an independent contractor or an employee, making dismissal of his case inappropriate. Second, Johnson argues that Armstrong cannot enforce the arbitration clause against him under state law because the transportation worker exemption of the FAA preempts conflicting state laws or, alternatively, Kentucky law does not compel arbitration of the operating agreement.

On review,

> 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. Apparently the trial court made no factual findings in this case, but based its ruling solely on the application of certain principles of contract law to the arbitration clause quoted above. Our review, accordingly, is *de novo*.

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[4] "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56[.]" CR 52.01.

Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 340 (Ky. App. 2001).

Johnson's first argument is that Armstrong cannot enforce the arbitration clause against him under federal law because independent contractors in the transportation industry are exempt from the FAA. Section 1 of the FAA provides, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." "Section 1 exempts from the FAA only contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 1311, 149 L.Ed.2d 234 (2001).

Johnson concedes that, at the time this matter was briefed before the trial court, as well as our court, courts across our nation varied in their interpretations of whether the FAA's exemption applies only to transportation workers who are employees or whether the exemption also applies to independent contractors. Johnson cited *Oliveira v. New Prime Inc.*, 857 F.3d 7 (1st Cir. 2017), asserting that the FAA exemption was intended to apply to employees and independent contractors alike.

Since the instant matter was submitted to our court, the Supreme Court of the United States has affirmed the First Circuit Court of Appeals in *New Prime Inc. v. Oliveira*, ___ U.S. ___, 139 S.Ct. 532, 202 L.Ed.2d 536 (2019). Therein, the Supreme Court held:

> [t]he Federal Arbitration Act requires courts to enforce private arbitration agreements. But like most laws, this one bears its qualifications. Among other things, § 1 says that *"nothing herein" may be used to compel arbitration in disputes involving the "contracts of employment" of certain transportation workers.* 9 U.S.C. § 1.
>
> . . . .
>
> While a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional. If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§ 3 and 4 of the Act often require a court to stay litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. But this authority doesn't extend to all private contracts, no matter how emphatically they may express a preference for arbitration.
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> . . . .
>
> Given the statute's terms and sequencing, we agree with the First Circuit that a court should decide for itself whether § 1's "contracts of employment" exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, *a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.*

Id. at 536-38 (emphasis added).

Although there were no findings of fact in the circuit court's order, it is evident the trial court failed to determine whether the FAA's contracts of employment exclusion applied to the parties' ICOA before dismissing this action and ordering arbitration as required by *Oliveira*. The ICOA at issue clearly indicates that Johnson was either Armstrong's independent contractor or employee engaged in the transportation industry, to which the exemption contained in Section 1 of the FAA applies.

Concerning Johnson's second, and alternative, argument that it is a disputed material fact whether Johnson was an independent contractor or an employee, this issue is largely rendered moot by *New Prime Inc. v. Oliveira, supra*. The Supreme Court held it matters not whether an individual—or perhaps entity—is an employee or independent contractor in the transportation industry for purposes of application of the exemption to arbitration found in Section 1 of the FAA.[5] Therefore, we must vacate the trial court's order.

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[5] The Supreme Court of the United States held:

> The only question in this case concerns the meaning of the term "contracts of employment " in 1925. And, whatever the word "employee" may have meant at that time, and however it may have later influenced the meaning of "employment," the evidence before us remains that, as dominantly understood in 1925, a contract of employment did not necessarily imply the existence of an employer-employee or master-servant relationship.

Id., at 542.

Johnson's third argument is that Armstrong cannot enforce the arbitration clause against him under state law because independent contractors in the transportation industry are exempt from arbitration through federal preemption of the FAA. In *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Supreme Court of the United States held that Congress intended the FAA to apply in state courts, and to preempt state antiarbitration laws to the contrary. *See id.*, 465 U.S. at 16, 104 S.Ct. at 861. Put another way, the FAA, where applicable, preempts all state law. *See Saneii v. Robards*, 289 F.Supp.2d 855 (W.D. Ky. 2003). Therefore, because the FAA applies to the ICOA at issue, it preempts state law to the contrary.

Johnson's final alternative argument is that, in the event the FAA exclusion is inapplicable, Kentucky law should be applied. Because the FAA applies and preempts state law to the contrary, we need not address this alternative argument.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is vacated and remanded.

ALL CONCUR.

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