

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000505-MR

TAYLOR BUILDING CORPORATION OF AMERICA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 01-CI-006626

LOUIS G. KELLEY and  
ELIZABETH L. KELLEY

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE: Taylor Building Corporation of America (Taylor) appeals the trial court's interlocutory order of February 13, 2002, denying its motion to compel arbitration pursuant to KRS<sup>1</sup> 417.220(1)(a). After a review of the record and the applicable authorities, we conclude that the trial court did not err in determining that Taylor waived its right to compel arbitration. Thus, we affirm.

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<sup>1</sup>Kentucky Revised Statutes.

On July 17, 1997, the appellees, Louis and Elizabeth Kelley, entered into a written contract with Taylor for the construction of a new house on property that the Kelleys owned in Oldham County. The house was completed in June 1998. Soon after the moving into their new home, the Kelleys discovered problems with its roof and windows. They gave Taylor written notice of the defects in the roof, soffit, and gutters on August 11, 1998; on November 10, 1998, they again gave notice that their windows leaked when it rained. The Kelleys allege that for the next two years, they attempted to have Taylor correct the problems with the roof and windows to no avail. The amount of water coming into the house on a regular basis was compromising the integrity of the structure and causing damage to the floors. Consequently, the Kelleys corrected the problems at their own expense.

On September 26, 2001, the Kelleys filed a lawsuit in the Jefferson Circuit Court stating claims against Taylor based on breach of contract, breach of warranty, and violations of the Kentucky Consumer Protection Act. They sought damages of \$11,113.32 to compensate for their expenses in repairing the house; damages for the harm that they had sustained As a proximate result of Taylor's unfair, false, misleading and/or deceptive acts or practices@ punitive damages; and a reasonable attorney's fee.

Taylor immediately filed a motion to compel arbitration of the dispute. The Kelleys argued that Taylor had waived its

right to arbitration by its dilatory tactics and by maneuvers manifesting a dogged determination on Taylor's part to avoid its contractual obligations to them. After a hearing on the motion, the trial court found that Taylor had waived its right to arbitration and that the Kelleys would be prejudiced by the imposition of arbitration. This appeal followed.

We review a trial court's determination of the parties' rights under a contract *de novo*. Conseco Finance Servicing Corp. v. Wilder, Ky.App., 47 S.W.3d 335, 340 (2001); Cinelli v. Ward, Ky.App., 997 S.W.2d 474, 476 (1998).

There is no question that the parties executed a contract providing for arbitration under certain circumstances. However, the following relevant provisions of the construction contract reveal that the right of either party to seek arbitration was not unconditional:

**BOTH PARTIES FURTHER AGREE:**

15. (a) Independent Third Party Inspection- That in the event of any dispute between [Taylor] and [the Kelleys] as to the quality of construction, quality of materials, contract disputes or similar disputes as to the construction, the parties shall proceed to select an independent third party inspector knowledgeable in the residential construction trade to inspect the subject real estate and provide a written opinion as to the subject real estate's substantial compliance with the construction agreement, blue prints, and description of materials. The costs of the third party inspection shall be equally shared by the parties hereto, and the decision shall be binding. Neither party shall attempt to influence the third party

inspector. Neither party may attend the inspection.

(b) Arbitration - In the event the issues cannot be resolved by a third party inspection, then any claims or disputes arising out of the Construction Agreement or the alleged breach thereunder shall be settled by mandatory and binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association [AAA] unless both parties mutually agree otherwise. (This position shall not affect [Taylor's] right to secure a mechanic's lien and to pursue those remedies described in Paragraphs 6 and 9 hereof.) Notices of the demand for arbitration shall be filed with a copy of this Construction Agreement with the American Arbitration Association and the other party to this Agreement. The site for the arbitration proceeding shall be Louisville, Kentucky.

(c) [This section sets out a buy-back alternative not relevant to the instant situation.]

16. That in the event any of the provisions of this Agreement as to a third party inspector, arbitration or first party buy back, are deemed unenforceable, or in the event of an action initiated by [Taylor] pursuant to Paragraphs 6 and 9 of this Agreement, both parties agree that any and all legal actions arising out of this construction agreement or the alleged breach thereunder shall be tried by a judge sitting without a jury and both parties do hereby Knowingly, Voluntarily and Intentionally waive any right to a jury trial. The site for the aforementioned action shall be Louisville KY (Jefferson County). Nothing herein is intended or shall be construed to limit or prevent [Taylor] from pursuing and perfecting any mechanic's lien upon the Real Estate and Improvements for sums unpaid under this Agreement. The provisions in this paragraph are a material inducement for [Taylor] to enter into this construction agreement. (Bold and emphasis in original.)

Taylor argues that the trial court erred in its determination that it had waived its right to arbitrate the contract dispute with the Kelleys. It correctly observes that arbitration is favored in Kentucky and that Awaiver will not be inferred lightly.@ Valley Construction Company, Inc. v. Perry Host Management Company, Inc., Ky.App., 796 S.W.2d 365 (1990). Taylor is also correct in arguing that if the party seeking arbitration establishes the existence of a Avalid, enforceable and irrevocable@arbitration agreement as described in KRS 417.050, our courts are compelled to require the parties to arbitrate their dispute. Id. at 366; KRS 417.060(1). However, the party seeking to enforce an arbitration agreement bears the burden of establishing the existence of such an agreement in the first instance. Id. at 368.

In determining whether the parties agreed to submit their dispute to arbitration, the courts Ashould apply ordinary state-law principles that govern the formation of contracts.@ First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed. 2d 985 (1995). Kentucky holds that it is the duty of the courts to ascertain and to carry out the original intentions of the parties. Wilcox v. Wilcox, Ky., 406 S.W.2d 152, 153 (1966); Collings v. Scheen, Ky., 415 S.W.2d 589, 593 (1967). A contract providing for arbitration of disputes (like any contract) Amust be construed as a whole, giving effect to all parts and every word in it if possible.@ City of Louisa v.

Newland, Ky., 705 S.W.2d 916, 919 (1986). Words employed by the parties should be accorded their plain and ordinary meaning, and the court may not re-write the contract. California Union Insurance Company v. Spade, Ky., 642 S.W.2d 582 (1982). Where a party seeks specific performance of a particular provision of the contract, he has the burden of establishing:

that he has complied with its terms, or that he is ready, able, and willing to perform his obligations under the contract, in their entirety, and to do whatever has been made a condition precedent on his part.

Kuntz v. Peters, 286 Ky. 227, 150 S.W.2d 665, 667 (1941).

Finally, ambiguities are generally construed against the drafter.

Home Folks Mobile Homes, Inc. v. Meridian Mutual Insurance Company, Ky.App., 744 S.W.2d 749, 750 (1987).

The application of these principles to the construction contract drafted by Taylor ably supports the ruling of the trial court. We begin our analysis with sub-paragraph 15(a) (cited infra at p. 3). In the plainest of words, this provision requires the parties to initially submit their dispute to an independent third party inspector. It does not put the burden on the Kelleys to secure an inspection. It states that in the event of a dispute, the parties shall proceed to select an inspector whose opinion shall be binding. It is undisputed that the parties did not select an inspector nor cause an independent inspection to be performed as required by the contract.

Next, sub-paragraph 15(b), relied upon by Taylor as compelling arbitration, provides that the parties shall submit their dispute to arbitration. However, this provision is prefaced by the conditional words: An the event the issues cannot be resolved by a third party inspection, then any claims or disputes ... shall be settled by mandatory and binding arbitration....@ (Emphasis added.) That language of 15(b), read in conjunction with 15(a) creates the recourse to a third-party inspection process as a condition precedent to mandatory arbitration.

Finally, paragraph 16 contemplates that the provisions in paragraph 15 may not result in a resolution of the dispute. In such an event, it directs that any complaint be resolved in the Jefferson Circuit Court sitting without a jury.

In its brief, Taylor states that Ait is undisputed that this matter cannot be resolved by a third party inspection.@ (Emphasis added.) Taylor provides no citation to the record to support this contention. After our review of the record, we have found no reason why it could not have been resolved pursuant to the method outlined in sub-paragraph 15(a) of the contract. The Kelleys could not proceed with the independent inspection process by themselves. The record reveals that the Kelleys repeatedly attempted to have the matter resolved by an independent third-party inspector. They even suggested that the parties submit a list of names of potential inspectors to a neutral party (such as

a judge) and allow him to select the inspector. Although Taylor advised the Kelleys that it was willing to abide by the independent third-party inspection process, it refused to allow the inspector to be selected by any one other than it. The parties could never agree on how the inspector would be selected, and thus the process did not take place.

No reasonable interpretation of the plain language of paragraph 15(a) and 15(b) would permit the parties to skip past the requirements of subsection (a) and to invoke the arbitration remedy automatically. The contract specifically requires the parties to comply with subsection (a) before the arbitration provision is triggered. We hold that when they failed to submit the dispute to a third-party inspector, the parties failed to comply with the contractual condition precedent to arbitration, thereby waiving operation of the arbitration provision.

We find no abuse of discretion or error in the ruling of the trial court. By failing to comply with the condition precedent, Taylor waived its right to compel arbitration. No other conclusion was reasonably possible. Accordingly, pursuant to paragraph 16 of the contract, the dispute must be resolved in the Jefferson Circuit Court.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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