

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001248-MR

TIMBERLINE CONSTRUCTION, INC.

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 98-CI-00663

GARY ALLEN PEDLEY;
NORMAN A. RALEY; AND
J. W. CHURCH COMMERCIAL
CONSTRUCTION, INC.

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Timberline Construction, Inc. ("Timberline") appeals from an order of the Daviess Circuit Court denying Timberline's motion to compel arbitration. We affirm.

On April 28, 1997 and May 2, 1997, contracts were entered into between Timberline, Gary Pedley ("Pedley") and Church Commercial Construction, Inc. ("Church"). Under the

contracts, Pedley and Church agreed to work as subcontractors to contractor Timberline and furnish labor and materials in the construction of a restaurant in Owensboro, Kentucky.

After construction began, Pedley was injured on June 13, 1997 when one of the restaurant's walls collapsed. On June 5, 1998, he filed the instant action in Daviess Circuit Court against Timberline and Church alleging negligence. After various preliminary matters were undertaken, the action languished until January 14, 2002, when Pedley moved for a trial date.

On April 12, 2002, Timberline filed a motion to dismiss the action for lack of subject matter jurisdiction. As a basis for the motion, Timberline relied on provisions of the 1997 contracts which required any controversy or claim arising between the contractor and subcontractors to be settled by arbitration. The motion was denied. Thereafter, Timberline filed a motion to compel arbitration and to stay the proceedings until the issues were fully arbitrated. Pedley filed a competing motion seeking to move forward with trial.

On May 21, 2002, the trial court rendered an order denying Timberline's motion and canceling a scheduled jury trial.¹ The court opined that Timberline's failure to raise the issue of arbitration until almost four years after the action

¹ Trial was cancelled when it became apparent that Timberline was prepared to prosecute the instant appeal.

commenced, and some three weeks prior to trial, constituted a waiver of its contractual right to arbitration. Alternatively, it concluded that Timberline's failure to comply with pretrial order deadlines constituted an absolute waiver of the arbitration provision at issue. This appeal followed.

Timberline now argues that the trial court erred in ruling that it waived its right to have the underlying dispute resolved by arbitration. Specifically, it maintains that KRS 417.050 does not permit the doctrine of waiver to be applied to an arbitration contract clause; that the law favors the enforcement of arbitration agreements; that the agreement to arbitrate must be enforced absent a showing of fraud; that no claim has been made that arbitration would be unfair or prejudicial to Pedley; and, that lack of jurisdiction cannot be waived. Timberline seeks to have the order on appeal reversed, and the matter remanded with instructions to enforce the arbitration clause.

We have closely studied Timberline's arguments and find no basis for tampering with the order on appeal. In reaching its conclusion that Timberline waived its right to compel arbitration, the trial court relied on Conseco Finance Servicing Corporation v. Wilder, Ky. App., 47 S.W.3d 335 (2001). As the parties no doubt are aware, Conseco stands for the proposition that ". . . waiver is among those grounds on the

basis of which a court may refuse to enforce an arbitration agreement." Id. at 344. This Court held in Conseco that waiver may be inferred from a party's actions, though such an inference shall not be lightly undertaken. Id. In determining whether a party waived a contractual right to arbitrate, the Court cited with approval Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir.,1995), which stated that " . . . an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate." Id.

In the matter at bar, it is uncontroverted that Timberline chose to proceed before a nonarbitral panel, to wit, the Daviess Circuit Court, rather than assert its right to arbitrate. Clearly, Conseco required the trial court to conclude that this action constituted a presumptive waiver. The dispositive questions, then, are whether Timberline overcame this presumption in its motion to compel arbitration, and/or whether Timberline correctly maintains that KRS 417.050 operates to bar the application of the waiver doctrine.

We cannot conclude that Timberline overcame the presumption that it waived arbitration, given that it waited almost four years after the action was filed to raise the issue of arbitration. It cannot reasonably be argued that the decision to proceed in circuit court rather than to demand

arbitration from the outset was anything but volitional choice, and the trial court correctly opined that it is one which Conseco requires Timberline to live with.

Similarly, we read Conseco as disposing of Timberline's assertion that KRS 417.050² operates to bar the waiver doctrine from applying to arbitration agreements. Conseco clearly held that waiver may be applied to arbitration agreements. Conseco aside, KRS 417.050 does not address waiver and we do not read it as an impediment to the application of waiver. As such, we find no error on this issue.

Lastly, Timberline asserts that Pedley has not claimed that arbitration would be unfair or prejudicial, and also argues that a lack of jurisdiction cannot be waived. While we agree with these assertions, they have little bearing on the resolution of the matter at bar. Waiver may be applied without a showing of prejudice. Conseco, supra, at 344 ("Unlike estoppel or laches, waiver may be found in the absence of prejudice to the party asserting it."). Similarly, there is no basis upon which we may conclude that the arbitration agreement operates to bar the circuit court from exercising jurisdiction.

² KRS 417.050 states, in relevant part that, "A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract."

For the foregoing reasons, we affirm the Daviess
Circuit Court.

ALL CONCUR.

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