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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000204-MR

BRADLEY J. VOSSBERG, M.D. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CI-002313

CARITAS HEALTH SERVICES, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Bradley J. Vossberg, M.D., appeals a January 8, 2004, order of the Jefferson Circuit Court denying his motion for a declaratory judgment. At issue is the arbitration clause in his employment contract with the appellee, Caritas Health Services, Inc. (Caritas). Dr. Vossberg argues

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the trial court erred in failing to declare arbitration clause to be illegal and unenforceable as a matter of law. We affirm.

The facts underlying this controversy are not in dispute. On June 30, 1999, Dr. Vossberg, a physician licensed to practice medicine in Kentucky, entered into a two-year employment contract with Caritas, the owner of a medical center and of an acute care hospital in Louisville. Under the terms of the agreement, Dr. Vossberg's annual compensation included a base salary of $145,000 as well as bonuses for productivity and performance.

Paragraph 18 of the employment contract required the parties to arbitrate "any dispute" arising out of the agreement that they were unable to resolve "by good faith negotiation." The same paragraph also provided that each party was responsible for paying his/its own legal fees and expenses and one-half of the cost of the arbitration.

Dr. Vossberg terminated his employment with Caritas in 2001. On March 17, 2003, he filed a lawsuit in which he alleged: (1) that Caritas was untimely in paying him a performance bonus of $10,000 that he earned in the year 2000; (2) that Caritas had not paid him any of the $10,000 performance bonus that he earned in 2001; and (3) that Caritas had failed to provide him an accounting to enable him to determine the amount

of any productivity bonus that he was owed. In addition to the sums owed to him under his employment agreement, Dr. Vossberg invoked the remedies available in KRS[2] Chapter 337, including double damages, attorney's fees, and court costs. He also sought both compensatory and punitive damages based on his allegation that he had been fraudulently induced by Caritas to enter into the contract in exchange for bonuses that the employer had no intention of paying.

Although Caritas did not initially respond to the lawsuit, it was granted leave to file an answer out of time. On July 21, 2003, Caritas filed a motion to stay the action and to compel the parties to arbitrate the dispute. Dr. Vossberg responded that the arbitration clause was never triggered in the first instance because Caritas had failed to negotiate his wage claim in good faith –- a condition precedent to seeking arbitration. He also relied on Healthcare of Louisville v. Kiesel, 715 S.W.2d 246 (Ky.App. 1986), in response to the claim of Caritas that he was not entitled to the benefits afforded by Kentucky's wage and hour laws. Finally, he argued that the arbitration clause was unconscionable due to the cost and inconvenience of arbitrating the claims in Washington, D.C.

On September 25, 2003, the trial court entered an order staying the action and compelling arbitration. It gave no

[2] Kentucky Revised Statutes.

explanation for referring the dispute to arbitration. The court did not address three of Dr. Vossberg's claims: (1) that the contract was unconscionable, (2) that it had been procured by fraud, and (3) that Caritas had waived its right to enforce the arbitration clause.

On December 22, 2003, Dr. Vossberg filed a motion pursuant to KRS 418.015, seeking a declaration that the arbitration clause was unenforceable pursuant to KRS 336.700(2), which provides as follows:

> Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

He also asked the court to set aside its previous order compelling arbitration of his wage dispute. On January 7, 2004, the trial court denied the motion -- again without elaboration or explanation. This appeal followed.

Dr. Vossberg argues that the trial court erred in refusing to declare the arbitration provision unenforceable for being offensive to statutory law. Although arbitration is a highly accepted method of resolving disputes in Kentucky, he contends that it is not particularly favored in the area of

employee/employer relationships. Dr. Vossberg claims that by specifically excluding employment contracts from the Kentucky Arbitration Act (KAA)(KRS 417.050) and by its enactment of KRS 336.700(2), the General Assembly has indicated an unwillingness to deprive employees of a judicial forum for the resolution of wage disputes despite the perceived benefits of arbitration.

We agree that Kentucky law does not favor arbitration in the context of employment disputes. Nonetheless, this matter has been pre-empted by the Federal Arbitration Act (FAA), 9 U.S.C. §§1-16. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), the United States Supreme Court held that the FAA was applicable to all written employment contracts -- except for contracts pertaining to certain transportation employees. Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the trial court did not err in refusing to declare the arbitration clause invalid.

By affirming the trial court's denial of the motion for declaratory relief, we do not imply that we concur with the contention of Caritas that Dr. Vossberg has lost all right to seek review of the trial court's order compelling arbitration. The trial court has rejected Dr. Vossberg's claims that the

agreement was unenforceable under general contract defenses: fraud, unconscionability, and failure to fulfill a condition precedent. That holding will be appropriate for appellate review after a final order is entered in the underlying litigation. It is only the interlocutory order compelling arbitration that is not yet ripe for our review.

Caritas contends that in order to preserve these issues for review, Dr. Vossberg was required either to appeal the September 25, 2003, order or to seek relief pursuant to CR 65.07. We disagree. Kentucky law holds that an order compelling arbitration is interlocutory in nature and is not subject to immediate appeal. Fayette County Farm Bureau Federation v. Martin, 758 S.W.2d 713 (Ky.App. 1988). In employment cases (not enforceable under the KAA but otherwise enforceable under the FAA), an order denying an application to compel arbitration may be reviewed pursuant to CR 65.07. Bridgestone/Firestone v. McQueen, 3 S.W.3d 366 (Ky.App. 1999). However, CR 65.07 is not available for review of an order compelling arbitration.

If Dr. Vossberg is disappointed with the results of the arbitration, his proper remedy will be to seek review of the trial court's order compelling arbitration by way of a direct appeal from a final judgment. Fayette County Farm Bureau Federation v. Martin, supra, at 714.

We affirm the decision of the Jefferson Circuit Court.

ALL CONCUR.

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