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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000702-MR

JAMES T. MILLER AND
CYNTHIA A. MILLER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CI-006065

CITY OF ANCHORAGE; HOLY ANGELS
ACADEMY, INC.; AND THE LONG RUN
PONY CLUB, INC.

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

TACKETT, JUDGE: James Miller and Cynthia Miller appeal from the decision of the Jefferson Circuit Court confirming the arbitrator's decision in their dispute with the City of Anchorage and other parties about the boundaries and ownership

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of property situated in Jefferson County. The circuit court granted their motion to vacate the award in part, and denied it in part, while granting in part Anchorage's motion to confirm the award. The Millers make a convoluted argument on appeal, including that the award was obtained by fraud and that it violates public policy, and should therefore be vacated.

Anchorage responds that the Millers are not entitled to relief on the grounds they claim, because the applicable statutes do not authorize setting aside an arbitration award for those reasons. The reasons alleged that are specifically authorized grounds for setting aside a reward, Anchorage argues, are not supported by the record. After a review of the record, we affirm the circuit court's decision.

Decades ago, in 1919, the plat of a subdivision named Bellevue Park was recorded in Jefferson County. The public streets and park included "Johnson Avenue" and "Parkway", which intersected at an area designated as a park. The plat includes the language "we. . . dedicate for public use, the streets, lake, and park shown. . . ." An artificial lake was constructed in the park, including an island, but over time, the City of Anchorage deposited fill dirt, asphalt, gravel, brush, leaves and other debris in the lake, and eventually the lake disappeared.

The City of Anchorage annexed the property in 1948, and the entirety of the park was located within Anchorage. Large portions of the property are now occupied by Long Run Pony Club, Inc., and Holy Angels Academy, Inc. The Millers purchased their property at the end of May 1996, after first leasing it. They noticed poor drainage and standing water on the property and consulted the U.S. Department of Agriculture's Natural Resources Conservation Service about the conditions of the soil. The Service concluded that drainage was impeded on the north part of the property, but that poor internal drainage is characteristic of conditions in the area. The Millers purchased the property with knowledge of this condition.

During the summer of 1996, discussions between the Millers, the City, the Pony Club and the Academy culminated in an agreement in which the City promised to use its best efforts to improve the right of way within Anchorage and immediately adjacent areas. The Agreement included provisions that any dispute arising out of the Agreement would be submitted to binding arbitration and the parties would not appeal the arbitrator's decision. The arbitration provision was suggested by Mr. Miller, who is an attorney and who had a hand in drafting the Agreement. The City performed what it believed to be its obligations under the Agreement, including removing material, grading the site and constructing swales. A proposed drainage

ditch was rejected by the Millers. The Millers, meanwhile, were obligated to obtain an official closing of the right of way, but they withdrew the application because they did not wish to own property that contained waste material.

The Millers filed this action in 1997 after unsuccessfully attempting to mediate their growing differences with the City. The circuit court refused to compel arbitration, holding that the agreement provided for mediation or arbitration, but not both; this Court disagreed with the circuit court's interpretation of the agreement and remanded the matter for arbitration. In December 2000, the Millers announced in their brief to the arbitrator that they would show that the property was dedicated to the public for use as a park, that the City has no claim of ownership to the park, that the City systematically destroyed the park and that the City impeded the natural drainage and forced storm water to collect on their property and that of Holy Angels Academy. The Millers sought damages equal to triple the cost of removal of all waste material from the site, including the former lake, and injunctive relief against what they described as the "continuing nuisance" of the storm water drainage. The arbitrator rejected the Millers' contentions and decided the matter in favor of the City, making extensive findings of fact. In 2002, the Circuit Court remanded the matter back to the arbitrator for

supplemental findings, which the arbitrator made after allowing the Millers to introduce evidence as if by avowal. In spite of the agreement not to appeal, the Millers sought to have the arbitrator's award set aside in the Jefferson Circuit Court, arguing that the relief they sought was not an appeal but extraordinary relief. The circuit court addressed the matter on its merits and rejected all of the Millers' claimed reasons for setting aside the award.

The circuit court issued an extensive opinion confirming the award in part and vacating it to the extent that the award purported to affect those who were not party to the Agreement. The court addressed the alleged deficiencies in the arbitrator's decision, noting that several of the Millers' objections to the award are not based on the applicable law, Kentucky Revised Statute (KRS) 417.160, which sets out the grounds for setting aside an arbitrator's award. First, the court rejected the argument that the arbitrator's award was not timely, noting the parties' own responsibility for the delays in the arbitration process and concluding that the plaintiffs were not unfairly prejudiced by any delay.

Next, the court held that the arbitrator's alleged failure to follow Kentucky law or public policy was not a ground to vacate the award under the statute, and noted the extremely limited scope of judicial review of an arbitrator's decision,

citing United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The court distinguished Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699 (Ky. 1991), a case decided before the adoption of the present statute, which lays out specific grounds under which an arbitration award may be challenged.

The court next specifically rejected the Millers' argument that the arbitrator refused to hear additional evidence, holding that the court never intended to reopen the proof when it remanded the matter for additional findings, citing its own order which referred to "additional arguments as to issues of law and entry of an Order." Even though not contemplated by the order, the arbitrator did allow entry of documents and testimony by avowal to provide a complete record, further noting that he would consider evidence "deemed material to issues of law resulting from the first findings and any new ones." Accordingly, the circuit court found that the Millers' argument that the arbitrator refused to hear evidence was without merit.

The court rejected a claim of bias or partiality on the part of the arbitrator. The court reasoned that the arbitrator acts as any other fact finder in that the arbitrator can decide the credibility or plausibility of witnesses' testimony, and elect to believe or disbelieve evidence. The

court concluded that the claims of partiality were not "direct, definite, and capable of demonstration", citing Anderson, Inc. v. Hortons Farms, Inc., 166 F.3d 308, 329 (6th Cir. 1998).

With respect to a claim that the arbitrator exceeded his authority, the court agreed that, to the extent that the arbitrator's decision purported to bind any one who was not a party to the agreement, the arbitrator had exceeded his authority. Therefore, the court set that portion of the award aside. The court did not agree that the arbitrator could not address the various claims brought by the Millers against those who were party to the agreement, including the claims for continuing trespass, nuisance and illegal dumping. The court held that those issues were encompassed in the agreement, and the arbitration clause thus applied to them.

The Millers also claimed that a portion of the award was "unintelligible". The Millers referred to an obviously incomplete sentence, and sought to vacate the entire award rather than seek clarification of the meaning of the sentence. The court instead used the context in which the incomplete sentence appeared to determine the intent of the arbitrator, holding that it was apparent that the word "none" or "neither" was missing before the phrase "have a fee ownership under the dedication and Kentucky law."

The court then determined that, although the case of Marks v. Bean, 57 S.W.3d 303 (2001) would appear to require a contrary result, this Court had previously determined before the Marks case was decided that the arbitrator was authorized to determine whether "false and material misrepresentations" were made by the City of Anchorage in the agreement itself. Therefore, the court reasoned, the law of the case for these litigants was that the arbitrator was empowered to determine that issue, and the parties were bound by his decision that the City made no fraudulent statements about the ownership of the lake or park or right of way.

The court left several issues unresolved, intending to determine the exact boundaries of the property, and, of necessity, the exact ownership of the property since the arbitrator specifically found that no party has fee simple title, at a later date. Nevertheless, it confirmed the award as it resolves a significant number of collateral issues in this complex and contentious litigation. This Court notes that the litigation will continue in the circuit court after this appeal is concluded, and specifically declines to rule on the merits of issues that remain before the circuit court for determination, especially those issues pertaining to the exact nature and status of the ownership of the subject property. The order of the court was a final and appealable order with respect to

numerous issues, and so we consider it to be properly reviewable.

The court closed its opinion with a regretful note that the tenor of the litigation had taken an "unfortunate and unnecessary turn," with respect to the Millers' attacks on the competency of the arbitrator to serve. "While one may disagree with his findings and conclusions in this case," the court observed, "such disagreement should not be so distastefully expressed as the Plaintiffs did in the Motion to Vacate and the reply in support of said motion." The court confirmed the award except to the extent that it would have bound defendants not party to the agreement, and this appeal followed.

At the outset we note that the Court's expressed concern for the tenor of the litigation seems to have gone unheeded. The Millers' brief to this Court is of similar tenor and tone as the pleadings submitted to the circuit court. It is regrettable that the Millers and their counsel appear to have so little regard for simple civility in litigation.

The Millers present little that is new in this brief, choosing to repeat the same arguments with little reference to the reasons why the circuit court rejected them. The Millers do contend that the circuit court misapplied the law by refusing to apply Carrs Fork to the present case, restricting its analysis only to the grounds authorized by statute. Because the

resolution of this question affects the resolution of all others, we address it first, and hold that the circuit court correctly applied the statute as the appropriate standard of review. Carrs Fork, which dealt with coal leases written long before the adoption of the Uniform Arbitration Act in Kentucky, has limited application when considering an arbitration agreement entered into after the effective date of the statute, which specifically sets out the circumstances under which an arbitration award may be set aside. Carrs Fork represents a general avenue of relief in the absence of a statutory structure. Our Supreme Court has held that this case does not apply in cases after the effective date of the Uniform Arbitration Act. 3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government, 134 S.W.3d 558 (Ky. 2004). Therefore, the circuit court did not err in refusing to apply it.

The statute authorizes setting aside an arbitration and under these conditions:

- (1) Upon application of a party, the court shall vacate an award where:
 - (a) The award was procured by corruption, fraud or other undue means;
 - (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
 - (c) The arbitrators exceeded their powers;
 - (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown

[therefore] or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; or (e) There was no arbitration agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(3) In vacating the award on grounds other than stated in paragraph (a) of subsection (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with KRS 417.010; or, if the award is vacated on grounds set forth in paragraphs (c) and (d) of subsection (1) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with KRS 417.070. The time within which the agreement requires the award to be made is applicable to the rehearing and commences on the date of the order.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

With respect to the timeliness of the award, we agree with the circuit court that the Millers, having taken advantage of and created delays themselves, may not be heard to complain of

delays in the award. The Uniform Arbitration Act provides no remedy for a violation of the deadline, and so the court made a determination that no prejudice to the Millers resulted. We hold that it was correct to do so, and that the Millers' objection is a technical one only, which should not result in setting aside the order.

The Millers' main argument is that the award was procured by fraud. The heading of this argument is somewhat misleading, in that the Millers do not actually argue that there was some sort of fraud in the proceedings themselves; instead, they argue that the City of Anchorage committed misconduct by failing to produce certain documents relating to whether the City held itself out as the owner of the property, when they held no actual deed to the property. The City, instead, believed it had title under the 1919 dedication, which specifically states that the property is dedicated as "an addition to Anchorage, KY", and through the 1948 annexation. The City had held the property without challenge for decades. This issue was specifically addressed in the arbitrator's findings, and the arbitrator chose not to hold that the City had made a material misrepresentation about the ownership status. The circuit court held that the Millers had access to the documents they now claim were withheld from them. Specifically, the arbitrator made a finding that Mr. Miller noticed and

commented that there was no "owner" listed on the dedication plat. Also, the agreement does not recite that the City "owns" the park or the right-of-way. The arbitrator concluded that there was no representation that the City "owned" the property on which the Millers could reasonably rely, therefore no fraud could have existed to excuse them from the provisions of the agreement. The Millers' challenge to the decision is an invitation to decide the material facts of the case anew, not to decide whether the arbitrator's decision itself was the product of fraud. The Millers seem to make no distinction between whether fraud existed in the formation of the agreement and whether fraud was the underlying reason for the arbitrator's decision. The statute is clear that the arbitrator's award can be disturbed only on a showing of the latter, which they have failed to do. Similarly, we find the court's analysis of the law of the case doctrine to be accurate. The law of the case for these litigants was that the arbitrator could determine whether fraud existed in the formation of the agreement, and the parties would be bound by his decision.

The Millers also argue that the award should be set aside because it is "unintelligible" as to the question of the ownership of the property. The Millers make reference to existing case law with respect to dedications, specifically Kreamer v. Harmon, 336 S.W.2d 561 (Ky. 1960). In that case, the

Court seems to state that dedication for public use does not pass title to the public, but creates an appurtenance on the subject property. That case, however, did not deal with parks, but with roadways. There is no Kentucky case authority on whether title passes to a municipal, county, or state authority when a private person dedicates property to public use as a park. The limited conclusion of the arbitrator on the issue of title, supplying the missing word as the circuit court did, is that none of the parties can claim fee simple title through the dedication. The circuit court must resolve this question in the subsequent course of this litigation. We hold that it did not err in supplying the missing word from the context of the remainder of the arbitrator's findings, and in refusing to set aside the award.

With respect to the arbitrator's alleged refusal to consider new evidence, we believe the circuit court correctly decided the issue. The circuit court's order remanding the case to the arbitrator for further findings on questions of law did not contemplate the introduction of additional proof, yet the Millers insisted on offering proof anyway. The arbitrator was under no obligation to accept this proof, yet he allowed the Millers to introduce it by avowal to complete the record. On top of that, the arbitrator specifically stated that he would consider such evidence that might prove useful to the resolution

of the questions before him. Therefore, we reject the Millers' contention for the same reasons stated by the circuit court.

With respect to the arbitrator allegedly exceeding his authority, we find this claim little more than an attempt to cloak an argument over the details of the interpretation of the agreement in the statutory language of KRS 417.160(1)(c). We do not believe this type of argument is what is contemplated by this provision. Instead, an example would be where an arbitrator has exceeded the scope of the issues he is authorized to decide, or attempts to bind entities not party to the arbitration agreement. We therefore find it without merit and reject it.

Likewise, we reject the claim that the award manifestly disregards well-settled Kentucky law, for the reasons stated above in our analysis of the Carrs Fork case. The scope of review is limited to the grounds specified in the statute, and this argument does not meet those requirements. Therefore, we reject it and its companion argument, that the award is contrary to public policy, as meritless.

For the foregoing reasons, the decision of the Jefferson Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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