

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000062-MR

THE DREES COMPANY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY BARTLETT, JUDGE
ACTION NO. 06-CI-01281

WILLA MARKETTA HAYES

APPELLEE

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OPINION AND ORDER
DISMISSING

** ** * * * **

BEFORE: ABRAMSON AND HOWARD, JUDGES; GUIDUGLI,² SENIOR JUDGE.

ABRAMSON, JUDGE: In May 2004, Willa Hayes contracted with The Drees Company, a multistate home builder, to construct a residence for her in Independence, Kentucky.

Construction was substantially completed, and the parties closed their transaction, in November 2004. By the following spring, however, it was clear that Drees's efforts to

¹ Judge Lisabeth H. Abramson completed this opinion prior to her appointment to the Supreme Court effective September 10, 2007. Release of this opinion was delayed by administrative handling.

² Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

seed Hayes's lawn had failed, so in June 2005, in response to Hayes's request, Drees again had the lot seeded and covered with straw. Soon thereafter, according to Hayes, her house was overrun by fungus gnats, thrips, straw itch mites, and other insects. Alleging that Drees's negligent seeding of her lot had caused the infestation, Hayes brought a damages suit against the company in May 2006. Shortly thereafter, in July 2006, Drees sought enforcement of an arbitration clause in the parties' May 2004 contract and moved, pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 – 16, to have Hayes's complaint stayed or dismissed pending the arbitration. The company now appeals from the December 7, 2006 order of the Kenton Circuit Court denying that motion. The trial court ruled that the arbitration clause expired with the rest of the contract in November 2004 and in any event that the clause did not apply to an alleged tort that did not coincide with a breach of contract. Drees contends that the trial court's ruling runs afoul of the FAA. We are unable to reach the merits of Drees's contention, because its attempted interlocutory appeal is not authorized under our law. Accordingly, we must dismiss the appeal.

Generally, of course, this Court's appellate jurisdiction is limited to the review of final orders and judgments, and we must dismiss, on our own motion if need be, appeals outside that limitation. CR 54.01; *Cavalier Homes of Alabama v. Coleman*, 181 S.W.3d 558 (Ky. 2005); *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978). There are exceptions to the finality rule, however, and as Drees correctly points out, both federal and Kentucky law provide in certain circumstances for an interlocutory appeal from an

order denying arbitration. See 9 U.S.C. § 16(a)(1)(B) and KRS 417.220. Contrary to Drees's assertion, however, the federal procedural provision does not apply in state court, *Southland Corporation v. Keating*, 465 U.S. 1, 16 n. 10, 104 S.Ct. 852, 79 L. Ed. 2d 1 (1984); *Atlantic Painting & Contracting Inc. v. Nashville Bridge Company*, 670 S.W.2d 841 (Ky. 1984); *Toler's Cove Homeowners Association, Inc. v. Trident Construction Company*, 586 S.E.2d 581 (S.C. 2003); and *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266 (Tex. 1992). KRS 417.220 provides in pertinent part that

[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration *made under KRS 417.060*.

(Emphasis added). However, Drees's motion did not invoke KRS 417.060, the provision in Kentucky's Uniform Arbitration Act for compelling arbitration, but relied exclusively upon the FAA, to which KRS 417.220 does not apply. It appears, therefore, that Drees has available to it neither statutory provision for an interlocutory appeal.

Confronted by similar circumstances in *Bridgestone/Firestone v. McQueen*, 3 S.W.3d 366 (Ky.App. 1999), this Court held that where KRS 417.220 does not apply, a party seeking interlocutory review of an order denying arbitration may not appeal, but may proceed under CR 65.07, the rule permitting interlocutory relief from orders "grant[ing], deny[ing], modif[ying], or dissolve[ing] a temporary injunction." In *Kindred Hospitals Limited Partnership v. Lutrell*, 190 S.W.3d 916 (Ky. 2006), our Supreme Court recently confirmed the availability of the CR 65.07 procedure for review of orders denying arbitration. In light of *Bridgestone/Firestone v. McQueen*, we are obliged to conclude that Drees has sought an avenue of review that is not open to it.

Accordingly, its appeal must be, and hereby is, DISMISSED.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

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