IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 19, 2004 Session

CHARLIE SPELL, III d/b/a CNS MANAGEMENT, ET AL. v. PATTI LABELLE, ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-02-1571-1 Walter Evans, Chancellor

No. W2003-00821-COA-R3-CV - Filed April 22, 2004

Plaintiff sued Defendant for breach of contract. Defendant filed a motion to dismiss the complaint based upon an arbitration provision contained in the parties' contract. The trial court entered an order staying litigation pending arbitration but found the site provision, providing that all disputes shall be settled by arbitration in Chicago, Illinois, unconscionable. The trial court reformed the parties' contract so that the arbitration would be governed by Tennessee law and occur in Memphis, Tennessee. Defendants appealed this decision. We reverse in part, affirm in part and remand.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in part, Affirmed in part and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Jef Feibelman, Memphis, Tennessee, for the Appellants, Patti Labelle, Pattonium, Inc. and Michelle Bellamy Buck d/b/a Bella Marketing.

Reginald L. Eskridge and Janelle R. Eskridge, Memphis, Tennessee, for the appellee, Charlie Spell, III d/b/a CNS Management and C & S Consultants.

OPINION

On August 16, 2002, Charlie Spell, III, a Tennessee resident, d/b/a CNS Management and C & S Consultants (Plaintiff) filed a complaint in the Chancery Court of Shelby County for breach of contract. In the complaint, Plaintiff alleges that they contracted with Patti LaBelle (LaBelle), a Pennsylvania resident, Pattonium (Pattonium), a corporation located in Pennsylvania, and Michelle Bellamy Buck (Buck), an Illinois resident, to perform a concert at the Pyramid in Memphis, Tennessee, but that LaBelle never performed at the concert. The contract contained an arbitration agreement which provides in pertinent part:

> This agreement sh[a]ll be construed in accordance with the laws of the State of Illinois. . . . Any claim or dispute arising out of or relating to this agreement or the bre[a]ch thereof shall be settled by arbitration in Chicago, Illinois in accordance with the rules and regulations then obtained of the American Arbitration Association governing their legal panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Based upon this arbitration clause, LaBelle and Pattonium filed a motion to dismiss the complaint. The trial court entered an order staying litigation which provided:

> Based upon the evidence presented, the arguments of counsel and the pleadings filed herein, the Court finds that the contract in question requires arbitration. The Court further finds that the requirement that the arbitration occur in Chicago, Illinois is unconscionable.
>
> IT IS, THEREFORE, ORDERED that this action be stayed and this Court shall retain jurisdiction of this matter, pending arbitration.
>
> IT IS FURTHER ORDERED that the parties' contract be and it is hereby reformed to require that the contract be governed by the laws of the State of Tennessee and the arbitration of this matter shall be held in Memphis, Tennessee.

Co-Defendant, Buck, filed a separate motion to stay litigation and refer to arbitration. LaBelle also filed a motion to reconsider the portion of the trial court's order finding the parties' selection of the arbitration site unconscionable. The trial court responded to Buck's and Labelle's motions by reiterating its prior ruling staying the litigation and reforming the arbitration provision. LaBelle and Pattonium timely filed their notices of a Rule 3 appeal. Plaintiff filed a motion to dismiss on appeal based on the argument that the trial court's orders were interlocutory and not appealable as of right. This Court denied the Plaintiff's motion to dismiss on appeal.

Issues Presented

Labelle and Pattonium appeal and raise the following issue, as we restate it, for our review:

1. Whether the trial court erred in finding the arbitration agreement's site and choice of law provisions of the parties' contract unconscionable and subsequently reforming those provisions.

Plaintiff raises the following issue for our review:

2. Whether the trial court's ruling is a final judgment from which LaBelle and Pattonium may appeal as of right.

Subject Matter Jurisdiction

This Court will first address the issue, as originally raised by Plaintiff, of whether this Court has jurisdiction to hear this case. While Plaintiff conceded at oral argument that the trial court's decision is a final order from which LaBelle and Pattonium may appeal, "subject matter jurisdiction cannot be waived." *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994) (citing *Dixie Sav. Stores, Inc. v. Turner*, 767 S.W.2d 408, 410 (Tenn. Ct. App. 1988); *Tenn. Dep't of Human Services v. Daniel*, 659 S.W.2d 625, 626 (Tenn. Ct. App. 1983)). Rather, in addition to considering those issues presented for review, "[t]he appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter." Tenn. R. App. P. 13(b).

Because this case involves interstate commerce, it is governed by the provisions of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307 (1999). *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 856 (Tenn. Ct. App. 2001). Concerning the appealability of trial court decisions, § 16 of the FAA provides:

> (a) An appeal may be taken from-
>
> (1) an order–
>
> (A) refusing to stay any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting, or vacating an award;
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
>
> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order–
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is the subject to this title.

9 U.S.C. § 16. As for the purpose of this section, the Second Circuit of the United States Court of Appeals has stated:

> Section 16 is a "provision governing appeals of orders concerning arbitration, [and] it endeavor[s] to promote appeals from orders barring arbitration and limit

> appeals from orders directing arbitration." *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2nd Cir. 1993) (citation omitted). In order to promote appeals from orders barring arbitration, section 16(a)(1)(C) provides that "[a]n appeal may be taken from- -order- -denying an application under section 206 of this title to compel arbitration."

Augustea Impb et Salvataggi, v. Mitsubishi Corp., 126 F.3d 95, 98 (2nd Cir. 1997).

In *Mitsubishi*, the parties entered into two separate agreements, a contract to transport cargo and bills of lading. *Id*. at 97. Both agreements contained arbitration provisions, but the original contract provided for arbitration in New York while the bills of lading required arbitration in London. *Id*. After both parties brought suit on the contract and bills of lading in the Southern District of New York, the trial court ordered arbitration to occur in London. *Id*. After considering a Rule 60 motion for reconsideration of its order, the trial court vacated its initial order compelling arbitration in London and ordered the arbitration to occur in New York. *Id*. at 97-98. On appeal, the Court of Appeals considered whether an order compelling arbitration was appealable under section 16 of the FAA. *Id*. at 98. The appellant argued that the trial court's refusal to order arbitration pursuant to the forum selected, London, by the parties was tantamount to an order denying an application to order arbitration. *Id*. While recognizing that the parties' forum selection is an essential element of the arbitration agreement, the court disagreed with the appellant. *Id*. at 98-99 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)). Rather, the court stated that "[w]e believe that a holding that a district court's order compelling arbitration in New York rather than London is the equivalent of an order denying arbitration pursuant to 9 U.S.C. § 16(a)(1)(C) would subvert section 16's purpose of promoting arbitration and 'prevent[ing] parties from frustrating arbitration through lengthy preliminary appeals.'" *Id*. (quoting *Stedor Enter., Ltd. v. Armtex*, 947 F.2d 727, 730 (4th Cir. 1991)). This Court respectfully disagrees with the result reached by the second circuit.

The central purpose of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). As for Section 16, "[i]ts inherent acknowledgment is that arbitration is a form of dispute resolution designed to save the parties time, money and effort by substituting for the litigation process the advantages of speed, simplicity, and economy associated with arbitration. " David D. Siegel, Practice Commentary: Appeals from Arbitrability Determinations, 9 U.S.C. § 16, at 352 (West Supp. 1997). However, as in this case, when the trial court compels arbitration but, *sua sponte*, reforms the parties' agreement as to their forum selection and that decision is not immediately appealable, both the purposes of the FAA and section 16 are thwarted. If the parties in this case were denied the right to appeal, they would have to proceed through arbitration, then appeal the trial court's action, and if it was determined by this Court that the trial court's reformation of the agreement should be reversed, the parties would have to conduct a second arbitration. Such a result surely does not ensure the "speed, simplicity, and economy associated with arbitration." Accordingly, we hold that an aggrieved party may appeal in the unique

situation where the trial court orders arbitration but, *sua sponte*, reforms the parties' choice of law and forum selection clauses.

Reformation of the Arbitration Agreement

Having determined that we have jurisdiction to hear this case, we must determine whether it was error for the trial court to change the parties choice of law from Illinois to Tennessee law and the place of the arbitration from Chicago to Memphis. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the United States Supreme Court upheld the validity of a forum selection clause because the forum selection "was made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Bremen*, 407 U.S. at 12. In this case, the trial court found the site provision unconscionable. However, the record gives us no indication that any of the parties were unsophisticated nor does the transaction appear to have resulted from anything but arm's length negotiations. Further, the original agreement was entered into by the Plaintiff and LaBelle and Pattonium with Buck signing as LaBelle's representative. Buck is a resident of Chicago, Illinois, and the contract is titled "Bella Marketing Management, 471 W. Winneconna Parkway, Chicago, IL 60620."

Plaintiff contends that the trial court was correct in modifying the forum selection clause based upon the case of *Dyersburg Machine Works, Inc. v. Rentenbach Engineering Co.*, 650 S.W.2d 378 (Tenn. 1983). In *Dyersburg*, the Tennessee Supreme Court recognized that "the more recent decisions hold that the validity or invalidity of . . . forum selection clauses depends upon whether they are fair and reasonable in light of all the surrounding circumstances attending their origin and application." *Dyersburg*, 650 S.W.3d at 380. The court, in relying upon *The Model Choice of Forum Act*, also outlined four exceptions to the enforceability of forum selection clauses:

> [A]n unselected court must give effect to the choice of the parties and refuse to entertain the action unless (1) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (2) or the other state would be a substantially less convenient place for the trial of the action than this state; (3) or the agreement as to the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means; (4) or it would for some other reason be unfair or unreasonable to enforce the agreement.

Id. (quoting *The Model Choice of Forum Act*, 1968). Plaintiff contends that Chicago "would be a substantially less convenient place" for the arbitration. They point to the facts that the Plaintiff is from Tennessee, that the contracted services were to be performed in Tennessee, and that the majority of the witnesses are located in Tennessee. While the *Model Choice of Forum Act* provides that any one of the exceptions could invalidate a forum selection clause, the *Dyersburg* court stated that the Act was not adopted in Tennessee. *Id*. at 380 n.1. Further, in holding that the forum selection clause should not be enforced, the court relied upon not only that the forum

selected was "substantially less convenient" but also that the forum selected would not provide the plaintiff a complete remedy. *Id*. at 380-81. In this case, there is no indication that the Chicago arbitration would not provide the Plaintiff a complete remedy. Further, the Plaintiff, a businessman, knew that Chicago would be a "substantially less convenient" place when they entered into the arbitration agreement with a Chicago business.

While *Bremen* and *Dyersburg* dealt with litigation forum selection clauses, arbitration forum selection clauses receive similar treatment. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). As previously stated, the central purpose of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). In carrying out this purpose, "the court must order the parties to arbitrate 'in accordance with the terms of the agreement'; one term of the agreement is the parties' forum selection clause'" and unless there is some compelling or countervailing reason against the forum selected, the clause will be enforced. *Snyder*, 736 F.2d at 418-19 (quoting 9 U.S.C. § 4 (1999)) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-19 (1972)). As previously discussed, the record contains no compelling or countervailing reason against the forum selected and as a result the arbitration shall occur in accordance with the forum selected by the parties.

As for the choice of law provision providing for the application for the laws of Illinois, "'Tennessee will honor a choice of law clause if the state whose law is chosen bears a reasonable relation to the transaction and absent a violation of the forum state's public policy.'" *Wright v. Rains*, 106 S.W.3d 678, 681 (Tenn. Ct. App. 2003) (quoting *Bright v. Spaghetti Warehouse, Inc.*, No. 03A01-9708-CV-00377, 1998 WL 205757, at *5 (Tenn. Ct. App. April 29, 1998)).[1] In this case, we find that Illinois bears a reasonable relation to the transaction because Buck, an Illinois resident, signed the contract as an authorized representative of LaBelle and Pattonium. Further, the contract's title indicates that it is an Illinois company's marketing agreement. Accordingly, we reverse the trial court's decision to change the governing law from Illinois to Tennessee and the location of the arbitration from Chicago to Memphis.

Conclusion

In light of the foregoing, we reverse the decision of the trial court to reform the parties' agreement. The order of the trial court staying litigation and compelling arbitration is affirmed.

[1] Although the reasoning, as applied in the *Wright* case, was in the context of a *inter vivos* trust agreement rather than an arbitration agreement, the distinction is inconsequential for our evaluation of the choice of law provision. 9 U.S.C. § 2 (1999).

Costs of this appeal are taxed to the Appellee, Charlie Spell, III d/b/a CNS Management and C & S Consultants, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE