IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

November 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

BLOUNT EXCAVATING, INC.,	)	NO. 03A01-9903-CV-00112
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Appeal As Of Right From
	)	BLOUNT COUNTY CIRCUIT COURT
DENSO MANUFACTURING TENNESSEE, INC.,	)	
	)	
Defendant/Appellant.	)	HONORABLE W. DALE YOUNG

For the Appellant:	**For the Appellee:**
Monty L. Walton	Robert N. Goddard
Knoxville	Maryville

AFFIRMED AND REMANDED

Swiney, J.

OPINION

This is an appeal from the Trial Court's refusal to affirm a submission by Denso Manufacturing Tennessee, Inc.,

Defendant/Appellant, as an arbitration award under Tenn. Code Ann. § 29-5-301 *et seq*., the Uniform Arbitration Act. Blount Excavating, Inc., Plaintiff/Appellee, filed suit for damages under a contract for improvements to the property of Defendant involving extensive earthmoving on two construction projects in Tennessee. Defendant filed an Answer and Motion for Summary Judgment, citing a contract clause appointing the architects/engineers on both projects, Allen & Hoshall, Inc. (hereinafter, "Architect"), to resolve disputes between the parties arising under the contract, with the clause setting out that such resolution "shall be final and binding." Defendant attached as exhibits to its filing, *inter alia*, copies of the contract clause at issue and a letter issued by the Architect denying substantially the same relief sought by Plaintiff in its Complaint. The Trial Court overruled the Motion. Defendant then filed an Application to Confirm Arbitration Award, attaching as exhibits essentially the same material exhibited to the Motion for Summary Judgment. The Trial Court overruled the application. Defendant appeals the Trial Court's denial of its Application to Confirm Arbitration Award. We affirm the Trial Court's denial of the Application to Confirm Arbitration Award, as there was never an arbitration of this dispute between the parties.

BACKGROUND

In July 1995 and September 1996, Plaintiff entered into contracts with Defendant to perform grading work for separate, but related, construction projects. A dispute arose as to the accuracy of bench mark information supplied by the Architect. According to Plaintiff, incorrect information from the Architect caused Plaintiff to have to move 200,031 more square yards of dirt than called for in the contracts. Under a contract clause governing disputes, Plaintiff submitted its claim for additional compensation for the extra work to the Architect by letter dated December 31, 1996. A letter dated February 17, 1997 from the Architect to Defendant discusses the claim and related findings, without a clear statement concerning the merits of Plaintiff's claim for additional compensation. A letter dated January 30, 1998 from the Architect to Plaintiff does clearly state a denial of additional compensation relating to Plaintiff's claim. Combined with another claim for additional site preparation work alleged by Plaintiff, damages arising from the contracts totaling $603,093.00 were asserted in the Circuit Court Complaint filed February 27, 1998.

Defendant filed its Answer April 7, 1998, asserting as an affirmative defense that the terms of the contract subject the claims brought in the Complaint to the "final and binding determination of the architect." Defendant cited the January 30, 1998 letter attached as exhibit to the Complaint as supporting the statement, "[t]hat decision is not subject to challenge or appeal before this Court."

On July 17, 1998, Defendant filed a Motion for Summary Judgment attaching an affidavit of an employee of the Architect identified as the project manager for the projects at issue, portions of the contracts between Plaintiff and Defendant, and copies of the letters referenced above. The basis for the Motion was that the Architect had entered a final and binding determination of the issues raised in the Complaint. On September 10, 1998 Plaintiff responded to the Motion, attaching the affidavit of its President and portions of the contracts at issue as exhibits. By Order filed October 27, 1998 the Trial Court overruled Defendant's Motion for Summary Judgment.

On December 16, 1998, Defendant filed an Application to Confirm Arbitration Award, citing the contract clauses and letters previously exhibited by the parties to the Trial Court. Defendant requested confirmation of the January 30, 1998 letter as an arbitration award under Tenn. Code Ann. § 29-5-312, alleging that Plaintiff had failed to timely move for vacation of the "arbitration award" under Tenn. Code Ann. §§ 29-5-313(b) or 29-5-314(a). Among other issues raised in its response, Plaintiff asserted that because it never had the opportunity to present evidence or cross-examine witnesses at a hearing, the Architect's letter was not enforceable by the Trial Court. By Order filed March 3, 1999 the Trial Court overruled Defendant's Application. Notice of this appeal of the March 3, 1999 Order was filed with the Clerk of the Trial Court March 19, 1999.

DISCUSSION

The only issue on appeal is whether the Trial Court erred in denying Defendant's application to confirm the Architect' s letter as an arbitration award. The Trial Court's review of an arbitration award is limited. In analyzing the actions of the Trial Court acting in this capacity, our standard of review as to findings of fact requires clear error by the Trial Court, and questions of law are to be resolved with respect for the public policy concerning arbitration.

> In *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445 (Tenn.1996), our supreme court sought to clarify and restate the standards of review to be utilized in an arbitration case. The supreme court held that based upon the policy of providing finality of arbitration awards and decisions, judicial review of arbitration decisions is limited. Based upon *Arnold*, this court does not have jurisdiction to review the merits of arbitration decisions, even if the parties allege that an award rested on errors of fact or misrepresentation of the contract. When reviewing decisions of the trial court, this court must accept the trial court's findings of fact unless they are "clearly erroneous." *Id.* at 449. The court also set forth the standard of review by this court pertaining to questions of law:
>
> > Matters of law, if not able to be resolved by resort to controlling statutes, should be considered independently, with the utmost caution, and in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. *Id.* at 450.

Adams TV of Memphis, Inc. v. International Broth. of Elec. Workers, AFL-CIO, Local 474, 932 S.W.2d 932, 934-935 (Tenn. Ct. App.1996).

Enforcement of a contract clause to arbitrate disputes is favored by legislative policy. "The Legislature has, by enacting the Uniform Arbitration Act, embraced a legislative policy favoring enforcement of such agreements." *Buraczynski v. Eyring*, 919 S.W.2d 314, 318-319 (Tenn. 1996). "It is the responsibility of the courts to give as broad a construction to an arbitration agreement as the words and intentions of the parties, drawn from their expressions, will warrant, and to resolve any doubts in favor of arbitration." *Wachtel v. Shoney's, Inc.*, 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991). Even applying such broad construction, the procedure at issue does not constitute an arbitration under the Uniform Arbitration Act, although it may set forth some other unnamed form of alternative dispute resolution.

The contract clauses material to the issue on appeal are the same for both projects. The agreement between Plaintiff and Defendant establishes the Architect as the actual agent of Defendant relating to the projects that are the object of the contract.

> 9.1 Owner's Representative. The Architect/Engineer will be the Owner's representative during the construction period. The duties and responsibilities and the limitations of authority of the Architect/Engineer as the Owner's representative are set forth in the Contract Documents and shall not be extended without the written consent of the Owner and the Architect/Engineer.

According to Defendant, the parties agreed to appoint the Architect as arbiter of disputes relevant to the issue on appeal.

> 9.8 Decisions on Disputes.
>
> (a) The Architect/Engineer will be the interpreter of the requirements of the Contract Documents and the judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and claims under Articles 11 and 12 in respect of changes in the Contract Price or Contract Time will be referred initially to the Architect/Engineer in writing with a request for a formal decision in accordance with this paragraph, which the Architect/Engineer will render in writing within a reasonable time. Written notice of each such claim, dispute and other matter will be delivered by the claimant to the Architect/Engineer and the other party to the Agreement promptly (but in no event later than thirty days) after the occurrence of the event giving rise thereto, and written supporting data will be submitted to the Architect/Engineer and the other party within sixty days after such occurrence unless the Architect/Engineer allows an additional period of time to ascertain more accurate data in support of the claim. The written decision of the Architect/Engineer, with respect to any such dispute, claim, interpretation or other matter, shall be final and binding upon the Owner and the Contractor.
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> (b) When functioning as interpreter and judge under paragraphs 9.7 and 9.8, the

> Architect/Engineer will not show partiality to the Owner or the Contractor and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. The rendering of a decision by the Architect/Engineer pursuant to paragraph 9.7 or 9.8(a) with respect to any such claim, dispute or other matter will be a condition precedent to any right of the Contractor to receive payment with respect to any matter in dispute.

Nowhere in the contract clauses at issue do the words "arbitration" or "arbitrate" appear. Not until the Application to Confirm Arbitration Award, the denial of which forms the basis of this appeal, does "arbitration" appear in the Trial Court record. Defendant argues that the absence in the agreement of the words "arbitrate" or "arbitration" is immaterial to whether this process was an arbitration. We do not disagree with this position. However, not only do the words "arbitration" or " arbitrate" not appear anywhere in the contract, neither do they appear in the Defendant's answer or Motion For Summary Judgment. While this is not controlling, it is a fact.

Although not specifically defined in Tennessee's Uniform Arbitration Act, arbitration is "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard." Black's Law Dictionary 105 (6th ed. 1990). This Court has previously addressed the inherent difference between arbitration and settlement negotiation, defining settlement negotiation as a compromise voluntarily agreed to by the parties. "Arbitration, on the other hand, is an 'adjudication' of conflicting interests by a neutral third party." *Smith v. Bridgestone/Firestone, Inc*., No. 01A01-9803-CV-00146, 1999 WL 86977 slip op. at 11 (Tenn. Ct. App. Feb. 23, 1999)(perm. app. denied). Therefore, an arbitration requires at least three participants: two or more adverse parties, and one or more arbitrators.

> As a general rule, absent some statutory prohibition, any person may be selected to act as an arbitrator to settle a controversy or dispute. . .. However, a party to the dispute, or someone so identified with a party as to be one in fact, may not fill the post of arbitrator.

6 C.J.S. *Arbitration* § 63 (1975).

> Obviously a person is disqualified to act as an arbitrator if he is himself a party to the dispute. An arbitrator is also disqualified where, at the time of the rendition of the award, there were pending unresolved disputes between the arbitrator and a named party to the arbitration relating to the arbitrator's personal interest.

4 Am. Jur. 2d Alternative Dispute Resolution § 159 (1995).

> In the ordinary case, a close relative, employee, agent, or business associate of one of the parties to the controversy may not properly act as an arbitrator.

Id. § 160. Defendant in its reply to Appellee's Supplemental Brief acknowledges that an "arbitration" requires a third party to serve as the arbitrator. As stated by the Defendant in its Reply Brief, "[a]n agreement to arbitrate is simply an agreement to allow a *third party* to consider and resolve disputes between parties." (emphasis added)

Even accepting Defendant's argument that Plaintiff waived formal hearing by complying with the procedure set forth in the contract, and waived objection to neutrality by agreeing to the appointment of the Architect to resolve disputes, it is apparent from the cited authorities that the Architect was not a proper arbitrator. Although in its Answer, Defendant denied " any general agency relationship" with the Architect, it is undisputed that the Architect was the actual agent of Defendant for all material purposes relevant to the issues raised by Plaintiff. Under Tenn. Code Ann. § 29-5-304, the method of appointment of arbitrators in the agreement is due deference in our analysis.[0] However, the procedure set forth in the contract at issue, in effect, made Defendant, through its agent,[0] the arbiter of its own dispute with Plaintiff, privileged to render its own "final and binding" decision on complaints brought against it, and in doing so fails to constitute an arbitration proceeding cognizable under the Uniform Arbitration Act.

The contractual provision of 9.8(b) which states that the Architect while serving as the "judge under paragraphs 9.7 and 9.8 . . . will not show partiality to the Owner or the Contractor . . ." provides no support for the argument that the Architect was an independent and separate third-party arbitrator. The Architect was Defendant's agent. This particular provision is equivalent to a provision that would provide for Defendant to serve as the "judge" in any dispute with Plaintiff, but that Defendant would be required to be impartial. The final result still leaves only the parties to the dispute involved in the " arbitration," with one of those parties serving, through its agent, as the "judge." While no appropriate designation for this arrangement is apparent to this Court, it is not an arbitration under the Uniform Arbitration Act. "It appears to us that some of the provisions of the Act were adopted as safeguards, to prevent parties from being victimized by the very finality that makes arbitration the procedure of choice for certain types of disputes." *Smith v. Smith*, 989 S.W.2d 346, 348 (Tenn. Ct. App. 1998)(where prerequisites to affirmation of an arbitration award were found to include a written agreement by the parties to arbitrate, and the right, not subject to waiver, to legal representation at any arbitration proceeding or hearing).

Defendant argues that Plaintiff failed to timely move to vacate the "award" under Tenn. Code Ann. § 29-5-313.

> 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.

Tenn. Code Ann. § 29-5-313(b).

The rock upon which Defendant's argument rests is that there exists an arbitration award under the Uniform Arbitration Act. Since no arbitration award exists, the time restrictions of Tenn. Code Ann. § 29-5-313(b) are not applicable. With no third party to serve as arbitrator, the procedure at issue fails to rise to the level of an arbitration under the Uniform Arbitration Act from which an enforceable award could issue.

This appeal is limited to whether or not the Trial Court erred in its denial of Defendant's Application to Confirm the Architect's Letter as an arbitration award. We state no opinion as to whether or not Section 9.8 creates an enforceable contractual dispute resolution process other than our holding that it does not result in an enforceable arbitration award. We find no error in the Trial Court's denial of Defendant's Application to confirm the Architect's letter as an arbitration award under Tenn. Code Ann. § 29-5-312.

CONCLUSION

The judgment of the Trial Court is affirmed, and the cause of action is remanded to the Trial Court for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant.

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D. MICHAEL SWINEY, J.

CONCUR:

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HERSCHEL P. FRANKS, P.J.

(Separate Concurring Opinion)

CHARLES D. SUSANO, JR., J.