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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 4, 2022 Session

THOMAS BUILDERS, INC. v. CFK EXCAVATING, LLC

Appeal from the Chancery Court for Davidson County
No. 21-0475-II Anne C. Martin, Chancellor

No. M2021-00843-COA-R3-CV

ARMSTRONG, J., dissenting.

I respectfully disagree with the majority's holding that the doctrine of prior suit pending is inapplicable here. The majority's discussion of prior suit pending is contained in footnote one of its opinion. Therein, the majority notes that the Rogers Group commenced an action (the "Cheatham County case") in Cheatham County against CKF Excavating and TBI. However, the majority omits the fact that TBI filed a cross-claim against CKF in the Cheatham County case. For the reasons discussed below, it is my opinion that TBI's cross-claim triggered the doctrine of prior suit pending and vested jurisdiction in the Cheatham County court. As such, the Davidson County court did not have authority to conduct a review of the arbitrator's decision.

The doctrine of prior suit pending requires proof of the following four elements:

> (1) the lawsuits must involve identical subject matter; (2) the lawsuits must be between the same parties or their privies; (3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; and (4) the former lawsuit must be pending in a court having personal jurisdiction over the parties.

West v. Vought Aircraft Indus., Inc., 256 S.W.3d 618, 623 (Tenn. 2008). The majority's conclusion that the prior suit pending doctrine is not applicable rests on element one, *i.e.*, "the lawsuit must involve identical subject matter." ***Id.*** The majority contends that element one is not established because

> CKF Excavating withdrew its motion to confirm the arbitration award in the Cheatham County case. *See* ***Cannon ex rel. Good v. Reddy***, 428 S.W.3d 795, 798 (Tenn. 2014) (holding that voluntary dismissal of former suit

> precludes dismissal of next suit based on prior suit pending doctrine); ***Walker v. Vandiver***, 181 S.W. 310, 311 (Tenn. 1915) (same). The Cheatham County case now concerns only the claims of Rogers Group. So both lawsuits do not concern identical subject matter.

In this regard, a closer look at the subject matter before the arbitrator in the Cheatham County case is warranted. Although arbitration was conducted in Davidson County, the arbitrator's award, which is now under review, undisputedly arose out of the Cheatham County case. As TBI states in its brief, in response to TBI's cross-claim in the Cheatham County case, CKF "submitted a demand to mediate and arbitrate" the issues between TBI and CKF. CKF submitted five claims to arbitration: 1) a claim for damages in the amount of $191,490.78 for the value of work performed, including $74,002.74 owed to the Rogers Group; 2) legal fees of $14,553.00 relating to the Rogers Group claim; 3) pre-judgment interest; 4) legal fees under Tennessee Code Annotated section 66-11-138; and 5) assignment of the arbitration fees to TBI. TBI submitted to arbitration a claim for damages in the amount of $163,137.93 arising from: 1) damages for delay; 2) costs to complete the scope of work; 3) pre-hearing interest; 4) costs to bond off CKF and the Rogers Group's liens on the project; and 5) allocation of the arbitration fees to CKF. TBI also requested that the arbitrator provide guidance concerning amounts owed to the Rogers Group by CKF and TBI. So, the issues submitted to arbitration arose from litigation between TBI and CKF in the Cheatham County action.

The arbitrator ordered TBI to place $74,022.74 in escrow and noted that this amount "can only be released to CKF upon CKF's presentation to TBI of documents showing that Rogers had been paid in full … including a release of lien, the lien bond and dismissal of TBI and any surety with prejudice of the lawsuit." The arbitrator also granted TBI's claim for damages arising from costs to bond off the Rogers Group's lien in the amount of $1,480. Additionally, in its subsequent motion for financial breakdown, TBI asserted that the amount awarded to CKF should be reduced to $39,211.96 "to be paid to Rogers." In March 2021, CKF filed a motion to confirm the arbitration award in the Cheatham County court. While CKF's motion to confirm was pending in the Cheatham County action, TBI filed its notice to vacate the arbitration award in the Davidson County court, and CKF subsequently filed a notice to strike its motion to confirm the arbitrator's award in the Cheatham County case. The majority, however, omits the undisputed fact that CKF's motion to confirm the arbitration award was pending before the Cheatham County court when TBI filed its motion to vacate the award in the Davidson County court, *i.e.*, a prior suit was pending. Furthermore, no action was taken by any party to dismiss the pending action in Cheatham County.

In its motion to vacate the arbitration award and memorandum in support thereof, which were filed in the Davidson County case, TBI asserts that "[g]rounds for vacating an award for the arbitrator exceeding his powers also include … [t]he arbitrator making a clearly erroneous factual conclusion as to the number of cubic yards of unsuitable soils

removed …," and "[t]he arbitrator's ruling as to the number of yards of unsuitable soils removed was a mistake of fact, a non-fact, or a clearly erroneous statement of fact." Then, in its brief to this Court, TBI asserts that "a financial breakdown of the award would logically include the key issue at arbitration—how many cubic yards of unsuitable soils in excess of 1,000 were removed from the Project by CKF." So, at all times during this litigation, TBI has held the position that much of the material removed by CKF was not "unsuitable soil," and that TBI is not liable to CKF—and by extension to the Rogers Group—for amounts billed by CKF. In short, TBI's defense and cross-claim in the Cheatham County case are predicated on its assertion that it was not liable for amounts claimed by CKF. Therefore, the resolution of all disputes by and between the parties rests on the ultimate outcome of the final arbitration award. As such, the identical subject matter was before the Cheatham County court, the arbitrator, and the Davidson County court such that the lawsuit should have been solely administered and adjudicated in Cheatham County where it was first filed and still pending.

As a final note, I disagree with the majority's statement that the doctrine of prior suit pending is not jurisdictional. In support of this contention, the majority relies on cases from our sister states, but largely ignores Tennessee caselaw on this point. The Tennessee Supreme Court has held that the doctrine of prior suit pending impacts subject matter jurisdiction. ***West***, 256 S.W.3d at 620, 622 (citing ***see, e.g., Cockburn v. Howard Johnson, Inc.***, 385 S.W.2d 101, 102 (1964)); ***American Lava Corp. v. Savena***, 476 S.W.2d 639, 640 (Tenn. 1972)). "'[W]hen courts have concurrent jurisdiction, the one that first acquires jurisdiction thereby acquires exclusive jurisdiction.'" ***West***, 256 S.W.3d. at 624 (quoting ***American Lava***, 476 S.W.2d at 640); ***Metro Dev. & Hous. Agency v. Brown Stove Works, Inc.***, 637 S.W.2d 876, 879 (Tenn. Ct. App. 1982). Therefore, "[t]he actions of a court that attempts to exercise jurisdiction over a case after another court with concurrent jurisdiction has already exercised jurisdiction are nullities." ***State ex rel. McPeek v. Long***, No. E2005-01670-COA-R3CV, 2006 WL 1163077, at *2 (Tenn. Ct. App. Apr. 28, 2006) (citing *see* ***State v. Hazzard***, 743 S.W.2d 938, 941 (Tenn. Crim. App. 1997)). "[T]he court which first takes jurisdiction thereby acquires exclusive jurisdiction of the case." ***Robinson v. Easter***, 344 S.W.2d 365, 366 (Tenn. 1961). It is well-settled that "[s]ubject matter jurisdiction refers to a court's lawful authority to adjudicate a legal matter[,]" and the parties can neither confer nor expand subject matter jurisdiction by either waiver or consent. ***New v. Dumitrache***, 604 S.W.3d 1, 14 (Tenn. 2020) (citations omitted). "Any order entered by a court lacking jurisdiction over the subject matter is void." ***Johnson v. Hopkins***, 432 S.W.3d 840, 844 (Tenn. 2013) (citation omitted). "Therefore, subject matter jurisdiction is a threshold inquiry, which may be raised at any time in any court. ***Id.*** (citation omitted). The question of subject matter jurisdiction may be raised by the parties or *sua sponte* by the court. ***Nandigam Neurology, PLC v. Beavers***, 639 S.W.3d 651, 667 (Tenn. Ct. App. 2021). For the reasons discussed above, having taken jurisdiction first, exclusive jurisdiction over the entire case rests with the Cheatham County court, and Davidson County does not have jurisdiction over this case. "A judgment entered by a court without subject matter jurisdiction is void, and we must vacate such order and dismiss the case

without reaching the merits." ***Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Systems***, 266 S.W. 421, 424 (Tenn. Ct. App. 2007), *perm. app. denied* (Tenn. June 13, 2008). Accordingly, I would vacate the Davidson County Chancery Court's order and remand for adjudication by the Cheatham County court.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE