IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 14, 2007 Session

TERRY PAUL, ET AL. v. MERIT CONSTRUCTION, INC.

Appeal from the Circuit Court for Polk County
No. CV-05-129 John B. Hagler, Judge

Filed June 27, 2007

No. E2006-00839-COA-R3-CV

Terry Paul and Alan Paul ("Plaintiffs") are the owners and operators of Paul Brothers Construction. Plaintiffs entered into an oral contract with Merit Construction, Inc. ("Defendant") to provide masonry work on a project on which Defendant was the general contractor. After providing masonry work for several months, Plaintiffs were presented by Defendant with a written subcontract. The written subcontract contained an alternative dispute resolution process which included binding arbitration. After this lawsuit was filed, Defendant filed a motion to stay these proceedings and to compel Plaintiffs to submit to mediation and/or arbitration. The Trial Court concluded that Plaintiffs had not agreed to the terms of the written subcontract and denied the motion. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

J. Ford Little, Robert P. Noell, and W. Michael Baisley, Knoxville, Tennessee, for the Appellant, Merit Construction, Inc.

H. Chris Trew, Athens, Tennessee, for the Appellees, Terry Paul and Alan Paul d/b/a Paul Brothers Construction.

OPINION

Background

This lawsuit was filed by Plaintiffs against Defendant, the general contractor on a construction project to build a new high school and an addition to the existing high school at Copper Basin. According to the complaint:

> In late August or early September 2004, the defendant contacted the plaintiffs to inquire as to whether the plaintiffs would perform the masonry work for sections 1 - 4 of the project. At that time, some other person or company was providing the masonry work for section 5 of the project. After some negotiation, the plaintiffs and the defendant reached an agreement whereby the plaintiffs would perform the masonry work for sections 1 - 4 of the project, which agreement included the price the defendant would pay for laying brick and block. The plaintiffs began the masonry work during September 2004.
>
> After beginning work on this project, generally at the end of each week, the plaintiffs would submit an invoice for the prior week's work based upon the price agreed to be paid for either block or brick work. The defendant paid these invoices timely through December 2004. In later December 2004 or early January 2005, the plaintiffs submitted an invoice for approximately three weeks' work. During January 2005, the defendant began to discuss the execution of a written Agreement between the parties and avoiding paying the afore-mentioned invoice. At some time during January 2005, the plaintiffs were presented with a standard form of Agreement between Contractor and Sub-Contractor which contained a recital that the Agreement was made "this 1st day of November in the year 2004." The plaintiffs acknowledge reviewing this Agreement, but deny formally executing it. As afore-mentioned, the plaintiffs had been working on this project since September, 2004, under a verbal agreement with the defendant.
>
> As afore-mentioned, the initial work to be performed by the plaintiffs involved sections 1 - 4 of the project. After starting on the work designated as sections 1 - 4, the defendant asked the plaintiffs to lay additional brick at another building referenced as "Part 5" of the defendant's project with the Polk County School System. Apparently, a dispute had arisen between the defendant and the prior masonry contractor for Part 5.

> The plaintiffs aver they laid block and brick as provided in the verbal agreement between the parties in a workmanlike manner prior to and during the months of January and February, 2005. The plaintiffs continued to invoice the defendant for their work the previous week and the early invoices in January 2005 were eventually paid by the defendant. At some point in late January 2005 and early February 2005, the defendant stopped paying the plaintiffs' invoices, with several outstanding, past due and owing.…
>
> The plaintiffs allege the defendants have not paid for a substantial number of brick laid and block laid pursuant to the original Agreement in September 2004 and additional brick laid under the separate Agreement for "Part 5."
>
> The plaintiffs aver they have performed work for which they are due payment and the amount due is past due and owing.
>
> The plaintiffs aver the defendant has breached the original Agreement and later Agreement, and the defendant is liable for the work performed plus incidental and consequential damages and attorney fees.…

(Original paragraph numbering omitted).

Defendant filed a motion to dismiss or, in the alternative, to stay the proceedings and to compel mediation and binding arbitration. Defendant claimed Plaintiffs entered into a written subcontract which contained the following provisions with regard to alternative dispute resolution:

> **11.1 INITIAL DISPUTE RESOLUTION** If a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be resolved through direct discussions, the parties shall participate in mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to any other form of binding dispute resolution. The location of the mediation shall be the location of the Project. Once a party files a request for mediation with the other party and with the American Arbitration Association, the parties agree to commence such mediation within thirty (30) days of filing of the request. Either party may terminate the mediation at any time after the first session, but the decision to terminate must be delivered in person to the other party and the mediator. Engaging in mediation is a condition precedent to any other form of binding dispute resolution.

* * *

> **11.6** Any controversy or claim arising out of or relating to the Subcontract, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. This requirement to arbitrate shall not apply to disputes which involve pass through claims asserted by the Owner against Contractor or by Contractor against Owner involving the Subcontractor's Work when such disputes between Contractor and Owner are not subject to Arbitration. Subcontractor agrees to the consolidation of any dispute with Contractor into any dispute between Contractor and Owner at the sole option of Contractor. Any arbitration hearing shall be held in Knoxville, Tennessee. This agreement to arbitrate shall be enforceable in accordance with the Federal Arbitration Act, U.S. Code, Title 9.

Plaintiffs responded to the motion to dismiss or to compel arbitration and claimed they had not entered into any written agreement with Defendant nor had they agreed to any form of alternate dispute resolution. As part of the response, Plaintiffs filed the affidavit of Terry Paul. In this affidavit, Terry Paul stated, *inter alia*:

> In approximately September or October 2004 we began work on Sections 1 thru 4 of the Project only based upon an oral agreement concerning the general scope of the work and the amount and timing of payments for our masonry work. At the time we began this work, a written contract was not discussed nor submitted to us for review and consideration. We did not discuss dispute resolution processes. Moreover, the words "mediation" and "arbitration" were not mentioned by Merit Construction.
>
> Between September 2004 and January 2005, we laid approximately fifty thousand (50,000) to sixty thousand (60,000) blocks, which was estimated to be around $225,000.00 of value in work according to our rates and in accordance with the industry and trade.
>
> In or around late December 2004, Merit Construction provided me and my brother, Alan, with a "Standard Form of Agreement between Contractor and Subcontractor." … Again, the Subcontract was first presented to us in late December 2004. We noticed Merit Construction had backdated the Subcontract with a date of November 1, 2004. The Subcontract concerned Sections 1 thru 4 of the Project only.

We reviewed the Subcontract, but did not sign it. At that time, we noticed the dispute resolution provisions, and in particular the arbitration provision. We did not want to agree to binding arbitration in the event of a dispute. During the times that Merit Construction insisted that we execute the Subcontract, Merit Construction had stopped paying our invoices. We had no choice but to continue working on the Project because we were owed money and had planned to continue providing masonry work on this Project for several more months. We were basically in a "take it or leave it" position.

We were informed by Merit Construction that if we did not agree to the Subcontract, they would continue withholding payment, which was at that time approximately $50,000.00. I recall at a meeting with Merit Construction while we were still debating execution of the Subcontract, my brother, Alan Paul, printed his name and title on the execution page of the Subcontract. We purposefully did not execute and sign the document for Paul Brothers Construction as we were still discussing with Merit Construction whether the Company would pay us for past due invoices. We did not receive adequate assurance of timely payment of these invoices, and for this reason, did not execute nor sign the Subcontract. At some point during the meeting, a representative of Merit Construction asked for the Subcontract in our possession. This person took it and looked at it, and without comment, kept it. The conversation then changed to a discussion of pending work and eventually we left the meeting. While I cannot speak to whether Merit Construction felt the Subcontract had been agreed to and signed by us, it is my position and that of my brother than we purposefully did not sign the Subcontract. We were content to continue working under the oral agreement.

As previously mentioned herein, we were hired by Merit Construction to provide the masonry work for Sections 1 thru 4 of the Project. After working several months on Sections 1 thru 4, Merit Construction asked us to move our equipment and men to provide masonry work on Section 5. We performed as requested by providing masonry work on Section 5 based upon oral conversations with Merit Construction. Later in 2005, we again began having problems receiving payment for our services from Merit Construction. The Company unilaterally decided not to pay us for our masonry work and our invoices remained past due and owing. Approximately $20,000.00 of monies due us from Merit Construction relates to masonry work on Section 5 of the Project. The balance due us relates to work on Sections 1 thru 4. Despite

> numerous attempts and threats, and eventually Merit Construction breaching the agreement, Merit Construction never mentioned or referred [to] mediation as an option.
>
> At no time did I fully agree with the contents of the Subcontract, which is why I did not provide my signature. When Merit Construction failed to pay us, we had no other choice but to leave the job and seek other work.

(Original paragraph numbering omitted).

The Trial Court entered an Order denying Defendant's motion to stay the proceedings and compel mediation and/or arbitration. According to the Trial Court, "the Subcontract relied upon by the defendant was not signed by the plaintiffs, and for this reason, the Subcontract is not the contract between the parties." Even thought the Trial Court denied Defendant's motion, it nevertheless stated that "[i]n the event the defendant desires to present additional evidence which relates to the formation of a contract between the parties, the defendant shall be allowed to do so with the filing of a Motion to Reconsider supported by additional proof." Defendant did not file a motion to reconsider setting forth any additional proof, but rather filed a notice of appeal pursuant to Tenn. Code Ann. § 29-5-319.[1]

On appeal, Defendant challenges the Trial Court's denial of the motion to stay the proceedings and compel mediation and/or arbitration. Defendant claims that Plaintiffs agreed to the terms of the written subcontract and the alternative dispute resolution clause must be enforced pursuant to the Federal Arbitration Act, 9 U.S.C. § 2, *et seq.* (the "FAA").

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), this Court observed that:

> While the purpose of the FAA is to ensure enforceability of arbitration agreements according to their terms, parties cannot be forced to arbitrate claims that they did not agree to arbitrate. *Frizzell Construction Company, Inc., v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 84 (Tenn. 1999). Arbitration under the FAA is a matter of consent, and as such, the parties are free to structure an

[1] Tenn. Code Ann. § 29-5-319 (2000) provides, among other things, that a direct appeal can be taken from an "order denying an application to compel arbitration made under § 29-5-303…."

> arbitration agreement as they see fit. They can limit which issues will be arbitrated and specify the rules under which the arbitration will be conducted. *Frizzell*, 9 S.W.3d at 84. When parties agree to arbitration, the FAA ensures enforcement of that agreement and the States cannot require a judicial forum for the resolution of a claim that the parties agreed to arbitrate. *Id*. "Therefore, the question essentially becomes 'what the contract has to say about the arbitrability of petitioner's claim....'" *Id*. (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76 (1995)). If the parties agree to arbitrate a claim, then it must be submitted to arbitration even if Tennessee law would prohibit arbitration of that particular claim. *See Frizzell*, 9 S.W.3d at 84. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.... To that end, 'the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.'" *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (citations omitted).…

Pyburn, 63 S.W.3d at 357.

In *Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521 (Tenn. Ct. App. 2005), we stated:

> A contract "must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced." *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001) (citations omitted). In determining mutuality of assent, courts must apply an objective standard based upon the parties' manifestations. *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 866 (Tenn. Ct. App. 2002).
>
> A determination of the parties' intentions generally involves a question of law ….

Staubach, 160 S.W.3d at 524.

Defendant correctly points out that:

> The apparent mutual assent, essential to the formation of a contract, must be gathered from the language employed by them, or manifested by their words or acts ... The undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the

> law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.

Sutton v. First Nat'l Bank of Crossville, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981) (quoting 17 C.J.S. *Contracts* § 32).

The proposed written subcontract given to Plaintiffs contained four lines for each of the parties to that agreement to complete in order to show their assent to the terms of the written subcontract. Several of these lines were already filled out with the pertinent information typed onto the agreement. The acknowledgment portion of the proposed written subcontract when it was presented to Plaintiffs looked like this:

> CONTRACTOR: MERIT CONSTRUCTION, INC.
>
> BY: _____
>
> PRINT NAME: PATRICK O'HARA
>
> PRINT TITLE: VICE-PRESIDENT
>
> SUBCONTRACTOR: PAUL BROTHER'S CONSTRUCTION
>
> BY: _____
>
> PRINT NAME: _____
>
> PRINT TITLE: _____

The written subcontract was signed by Patrick O'Hara on behalf of Merit Construction, Inc. Mr. O'Hara's signature was placed on the "BY: _____" line. Alan Paul printed his name and title on the two lines requesting that particular information. However, the line which provided "BY: _____" was left blank.

Defendant argues that by printing his name and title on the lines requesting that information, Alan Paul demonstrated his agreement to the terms of the written subcontract, even though no one from Paul Brother's Construction ever signed their name to the written subcontract and left the "BY: _____" line blank.

If, as Defendant claims, filling out the signature line was unnecessary because Alan Paul printed his name and title on the subcontract, Defendant offers no explanation why Patrick O'Hara felt compelled to sign his name to the subcontract for the Defendant even though his name and title already had been printed on that document as well. It is a reasonable inference that if Patrick O'Hara believed it was necessary for him to actually sign the document, then Alan

Paul's signature likewise would be equally as necessary. Defendant also claims that Alan Paul's printing of his name supports an inference that Alan Paul agreed to the terms of the subcontract. But again Defendant fails to offer an explanation as to why Alan Paul's refusal to sign his name to the written subcontract does not create an even stronger inference that he did not assent to the terms of the proposed written subcontract. This is even more apparent when considering that the written subcontract was presented to Plaintiffs well after they began working on the project pursuant to the oral contract and after Plaintiffs allegedly were owed money for work already completed pursuant to the oral contract.

Defendant correctly points out that a written contract does not have to be signed in order to be binding. *See T.R. Mills Contractors, Inc. v. WRH Enters., LLC,* 93 S.W.3d 861, 865-66 (Tenn. Ct. App. 2002). "What is critical is mutual assent to be bound." *Id*. Defendant claims that Plaintiffs manifested their assent to be bound by the written subcontract by continuing to work on the project. We disagree. Plaintiff's continued work on the project they had been working on for some months is nothing more than a manifestation of their intent to keep working under the previous oral agreement.

When applying an objective standard in order to ascertain whether there was mutual assent to the terms of the written subcontract, we are unable to conclude that the Trial Court committed error when it determined that the written subcontract was "not the contract between the parties." It necessarily follows that the Trial Court did not err when it determined that Plaintiffs had not consented to the provisions addressing alternative dispute resolution, including mandatory and binding arbitration.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are assessed to the Appellant Merit Construction, Inc., and its surety.

_____

D. MICHAEL SWINEY, JUDGE