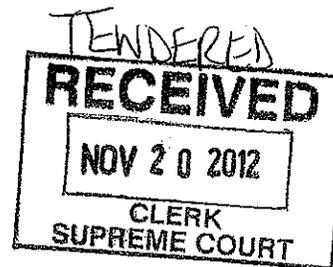


SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY
NO. 2011-SC-000668



JPMORGAN CHASE BANK, N.A.

APPELLANT

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002006
v. JESSAMINE CIRCUIT COURT CASE NO. 03-CI-00635

BLUEGRASS POWERBOATS, *et al.*

APPELLEES

REPLY BRIEF OF APPELLANT
JPMORGAN CHASE BANK, N.A.

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CERTIFICATE REQUIRED BY CR 76.12(6)

I certify that I filed a copy of this brief by Federal Express overnight mail, and served it by first class US mail on November 19, 2012 to: Hon. Hunter Daugherty, Jessamine Circuit Court, 101 N. Main St., Nicholasville, Kentucky 40356; and Frederick J. Anderson, 400 Court Square Bldg., 269 W. Main St., Lexington, Kentucky 40507.

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ARGUMENT

Appellees James Taylor and Bluegrass Powerboats urge this Court to direct the parties to a trial of this matter, in spite of a final decision to dismiss Appellees' claims rendered by a Kentucky arbitrator selected by both sides. This Court's recent decision in *Schnuerle v. Insight Communications, Company, L.P.*, 376 S.W.3d 561, 574 (Ky. 2012), aptly notes "that in Kentucky, unlike most jurisdictions, arbitration enjoys the imprimatur of our state Constitution. . . . Further, our legislature has statutorily recognized a public policy preference favoring arbitration." Rather than favoring arbitration, as the law in Kentucky requires, Appellees propose an interpretation of law and a misstatement of the facts that completely undermines any expediency or certainty afforded by arbitration agreements. Appellees' arguments are inconsistent with Kentucky law, and Chase is entitled to enforcement of the arbitration award and judgment in its favor.

A. Appellees Have Recklessly Misstated the Record.

As an initial matter, Chase urges the Court to review the record carefully because Appellees' Counterstatement of the Case includes mistakes or misrepresentations of the record. Two particular points are glaring. First, Appellees' recitation of facts relating to Chase's efforts in 2008 to press for resolution of Count 2 of the Complaint are misleading and in some respects constitute a flat misstatement of the record. Appellees imply that Count 1 of the initial Complaint was dismissed in April 2007 and that Chase moved to dismiss Count 2, the relevant count in this appeal, on May 14, 2008. [Appellee Brief, p. 5.] However, the actual record confirms that Chase filed a motion in the trial court in March 2008 seeking to dismiss Count 1 because Appellees' alleged damages had been paid by Greg Shearer, the party to whom James Taylor sold the business, and thus that

claim was satisfied and settled in full. As part of this motion, Chase further sought an administrative resolution of Count 2 because the Appellees had failed to pursue the claim through arbitration for almost four years. Record (“R”): 447-454 (Chase Motion to Dismiss). Moreover, Appellees fail to acknowledge that they did not file the arbitration on Count 2 *until after* receiving Chase’s motion, but before the day of the noticed hearing. R: VR No. __: 4/10/08; 9:22:02. Finally, although Appellees argue here, for the first time, that the arbitrator could not properly consider the timeliness of the filing of the arbitration, Appellees specifically argued in the trial court in 2008 that the issue *could only* be considered by the arbitrator. R: VR No. __: 4/10/08; 9:21:57 (“ . . . so if [Chase] wants to bring that up, it needs to go before the arbitration board, not before this court.”). Thus, it was entirely proper for the arbitrator to review Chase’s challenge to the timeliness of Count 2.

Second, Appellees mischaracterize sworn testimony as contained in the affidavits of Mr. Taylor and the signature card language under which the trial court found Appellees to be bound. For example, contrary to Appellees’ statement that Mr. Taylor claimed that the signature card that he signed “did not contain . . . an acknowledgement of receipt of the Bank’s Rules and Regulations pamphlet” [Appellee Brief, p. 4], Mr. Taylor’s actual testimony merely concludes that “[t]he sample card provided by [the bank] . . . was not what [he] signed,” and “[he] never saw a card like the one” produced by the bank. R: 187 (Affidavit attached to Appellees’ Sur Response, May 5, 2004). Ultimately, the trial court conducted a hearing, reviewed the evidence produced by both parties, made specific findings of fact, and determined there was an agreement to arbitrate. R: 205 (Decision and Order of Court, May 5, 2004) (“this Court finds that

James D. Taylor did sign the signature card which Terri Morsink states was being used by Bank One during the month of June, 2003 and that, contrary to the affidavit of Mr. Taylor, he was provided a pamphlet titled 'Rules and Regulations'" containing the arbitration provision). Accordingly, the court held "the arbitration provision found in Bank One's account rules and regulations are enforceable in accordance with their terms." *Id.* The trial court made specific findings of fact - which were never withdrawn - squarely rejecting Taylor's testimony. *Id.* Given Appellees' substantive arguments before this Court, the accuracy of the record on these and other issues is important.

B. The Arbitrator Appropriately Considered And Decided Timeliness.

For the first time in this case, and in direct opposition to Appellees' arguments to the trial court in 2008 that the issue of timeliness *could only* be considered by the arbitrator, R: VR No. __: 4/10/08; 9:21:57 ("... so if [Chase] wants to bring that up, it needs to go before the arbitration board, not before this court."), Appellees urge this Court to conclude that the arbitrator could not consider and rule upon the timeliness of Appellees' arbitration. [Appellee Brief, pp. 10, 13.] Appellees argue that merely a contract claim was referred to the arbitrator, and the arbitrator was prohibited from considering the timeliness of the arbitration. *Id.* at 24.

But the trial court's original order to arbitrate made no such distinction, R: 203-206 (Decision and Order of Court, May 5, 2004), and Appellees offer no authority that precludes an arbitrator from considering timeliness. In contrast, this Court has affirmed such consideration. *See Spears v. Carhartt, Inc.*, 215 S.W.3d 1, 7-9 (Ky. 2006) (affirming arbitration decision that arbitration of particular issue was not timely).

Moreover, the dispute between Chase and Appellees was expressly governed by the rules of the National Arbitration Forum (“NAF”). R: 60-91 (Attachment, p. 15 [R: 81], to Motion to Dismiss Count 2 Pursuant to CR 12.02, or, Alternatively, To Stay Further Proceedings Pending Arbitration). NAF Rule 10 established the “Time Limitations” for claims brought in arbitration; thus, the Rules contemplated that the arbitrators could consider the timeliness of the actions before them. Rule 10 was the basis for Chase’s argument that Appellees’ arbitration should be dismissed, and Chase’s motion to dismiss led directly to the arbitrator’s dismissal. R. 473-74 (Chase’s Response to Motion to Set for Trial, at 2); R: 479 (Order, attached as Exhibit A to Chase’s Response to Motion to Set for Trial).

Appellees have argued that NAF Rule 10, by its terms, does not apply “to any case that is directed to arbitration by a court of competent jurisdiction.” [Appellee Brief, pp. 10-11.] Once again, Appellees offer no authority for this capricious limitation on the application of Rule 10.¹ In effect, Appellees ask this Court, and presumably those below, to scrutinize the arbitrator’s application of the arbitration rules. But the arbitration statutes - both the Federal Arbitration Act (“FAA”) and the Kentucky Uniform Arbitration Act (“KUAA”) - are designed to limit any court’s substitution of its judgment for that of the arbitrator. “Generally, much judicial latitude and deference are accorded to an arbitration decision.” *Lombardo v. Inv. Mgmt. and Research Inc.*, 885 S.W.2d 320, 322 (Ky. App. 1994). Moreover, “an arbitrator’s resolution of factual disputes and his application of the law are not subject to review by the courts.” *ConAgra Poultry Co. v.*

¹ The Jessamine Circuit Court did not require Chase and Appellees to engage in arbitration; it merely ordered that if Appellees brought a claim against Chase, it had to be arbitrated. Indeed, the remainder of Rule 10, relating to the tolling of the limitations period, cannot be read coherently with Appellees’ interpretation of the last sentence.

Grissom Transp., Inc., 186 S.W.3d 243, 245 (Ky. App. 2006). In addition, an arbitration decision “will not be disturbed by the courts ‘merely because it was unjust, inadequate, excessive or contrary to law.’ . . . this Court has consistently held that an arbitration award is to be considered the end of the controversy-not the beginning.” *Id.* (citing *Carrs Fork Corp. v. Kodak Min. Co.*, 809 S.W.2d 699, 702 (Ky. 1991)). It is improper for a court to second-guess the arbitrator’s application of the agreed-upon rules.

The arbitrator appropriately considered the timeliness of Appellees’ filing of the arbitration. Chase argued and Appellees defended the question, and Kentucky law does not permit a court to revisit the conclusions of the arbitrator except in very narrow circumstances, none of which were presented in this case.

C. **The Trial Court Did Not Retain Jurisdiction To Reconsider Its Order To Arbitrate.**

Appellees argue that the trial court retained and properly exercised jurisdiction when it reconsidered its 2004 order staying Count 2 for arbitration. [Appellee Brief, p. 16.] Appellees essentially conclude that the trial court retains jurisdiction in perpetuity, without regard for what happens in any arbitration. Not only does this conclusion degrade the integrity and viability of arbitration, it also is contrary to Kentucky law, which makes clear that a trial court’s jurisdiction, after a matter has been referred to arbitration and particularly where the arbitration has already taken place, is severely constrained. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 692 (Ky. 2010) (“We recognize that when a lawsuit is submitted to arbitration, the trial court technically retains jurisdiction over the proceeding while the issues are arbitrated. . . . The trial court’s function is constricted to the simple entry of a final judgment enforcing the arbitrator’s decision. . . . Only if the arbitrator’s decision is alleged to have been tainted by fraud or

favoritism does the trial court have the ability to intercede.” (citations omitted)).

[Appellant’s Brief, pp.17-18.] Based merely on Appellees’ assertion, and no conclusive finding by the trial court, that *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009), had “changed the law” with regard to the enforceability of the parties’ arbitration agreement, the trial court improperly set aside the order to arbitrate and directed the parties to prepare the dispute for trial. R: 512 (October 2, 2009, Minute Entry Setting Aside Order To Arbitrate); R: VR No. __: 10/1/09; 9:41:40.

Appellees have argued that “Taylor made it clear his motion to set aside the order to arbitrate was based on there being no signed agreement to arbitrate.” [Appellee Brief, p. 23.] But the trial court’s ruling is not clear on this point. Over Chase’s objections, the trial court determined that because it had stayed the claim at issue rather than dismissing it, the trial court retained jurisdiction to reconsider its May 2004 order to arbitrate. The trial court then further held that it could rely on the alleged change in the law caused by *Ally Cat* as a basis for disregarding the arbitration award. R: VR No. __: 9/10/09; 9:21:36; R: VR No. __: 10/1/09; 9:36:18; R: VR No. __: 10/1/09; 9:39:25. However, the trial court did not articulate which part of *Ally Cat* it found persuasive and controlling, and it granted Appellees’ motion without written findings or conclusions. R: 512 (October 2, 2009, Minute Entry Setting Aside Order to Arbitrate), R: VR No. __: 10/1/09; 9:41:40. And even more troubling, Appellees now acknowledge that *Ally Cat* was not a change in the law. [Appellees’ Brief, p. 18.]

Appellees presented the precise question of whether there was an agreement to arbitrate to the trial court in 2004, and the trial court considered it, weighed the evidence presented, and properly decided to enforce the arbitration agreement and stay the case.

Simply put, *Ally Cat* does not support the lower courts' rulings. Unlike the consumer in *Ally Cat*, evidence admitted and weighed by the trial court demonstrated that Appellee James Taylor signed an agreement with Chase indicating his assent to be bound by the applicable provisions of the Account Rules and Regulations, including the conspicuous arbitration provision. Additionally, as the arbitrator found, Chase's agreement was governed by the FAA, 9 U.S.C. § 1, *et seq.*, and this Court has expressly concluded that *Ally Cat* has no application to agreements governed by the FAA. *See Hathaway v. Eckerle*, 336 S.W.3d 83, 87 (Ky. 2011), quoting *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 687 n.8 (Ky. 2010). Moreover, even if the FAA was not applicable and Chase was required to proceed under the KUAA, this case would fall within the narrow exception to the venue requirement of *Ally Cat*. The arbitration had already been heard in Kentucky by a Kentucky arbitrator who decided the dispute by final order and dismissal with prejudice, all several weeks before Appellees first raised any challenge under *Ally Cat*.

Appellees compare this case to *Saneii v. Robards*, 289 F. Supp. 2d 855 (W.D. Ky. 2003), to argue that the trial court's actions were proper. But Appellees' reliance on *Saneii* is misplaced. First, the decision of a federal district court interpreting Kentucky law is not binding on this Court. Second, the federal court ruled as it did in *Saneii* because between the time arbitration was ordered and the arbitrator commenced proceedings², the Kentucky Court of Appeals issued new law, deciding that an arbitrator may not determine fraud in the inducement claims; only a court could do so. 289 F. Supp. 2d at 863, *citing Marks v. Bean*, 57 S.W.3d 303 (Ky. App. 2001). In contrast, nothing in Kentucky law prohibits an arbitrator from deciding issues related to banking

² In this case, arbitration commenced before *Ally Cat* was issued.

law, or, more important, from deciding whether an arbitration has been initiated in timely fashion. In this action, the “new” law Appellees cited, and on which the trial court apparently relied, *Ally Cat*, did nothing to deprive an arbitrator of the authority to decide the issues of banking law presented here, or, more important, to decide whether an arbitration has been initiated in timely fashion. Third, this dispute is subject to the FAA, not the KUAA, and thus the “new” venue ruling in *Ally Cat* is of no effect. Finally, *Ally Cat* did nothing to alter the requirements to establish an agreement to arbitrate, as even Appellees now concede. [Appellee Brief, p. 18.] *Saneii*, therefore, is inapposite.

Regardless of when the question is considered - pre- or post-*Ally Cat* - the result is still the same. There was a valid agreement to arbitrate. Appellees should not be permitted to relitigate the matter, as the trial court did not have jurisdiction to set aside its 2004 order following the parties’ binding arbitration.

D. The Arbitrator’s Decision Was An Award, And The Court Was Required to Confirm It.

Because the trial court could not set aside its 2004 order, its jurisdiction was confined to the actions permitted by statute. Kentucky law supports the conclusion that the arbitrator’s decision on the timeliness of Appellees’ action in this case was an “award” entitled to enforcement by a Kentucky court. The case was not administratively dismissed by the arbitration forum, as happened in *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681, 685-86 (Ky. App. 2009), and in *Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Conn., Inc.*, 980 A.2d 819, 831 (Conn. 2009). In stark contrast to those two cases on which the Court of Appeals relied for its decision, the parties here participated in the selection of a Kentucky arbitrator and submitted substantive legal memoranda on the

timeliness of Appellees' claim. The arbitrator's decision conclusively resolved the dispute between the parties and adjudicated their rights. As Chase has argued, the decision of the Court of Appeals in *Harlow v. Beverly Health & Rehab. Serv., Inc.*, 2009-CA-001852-MR, 2010 WL 4669189 (Ky. App. Nov. 19, 2010) (unpublished), guides here, and Appellees offer no legal authority to undermine the conclusion that the arbitrator's decision in this case is an award entitled to enforcement. Because there is no allegation that the arbitration award was procured by fraud, because there is no evidence that the arbitrator was corrupt, and because there is no claim that the arbitrator engaged in misconduct, refused to postpone a hearing, or exceeded his powers, there is no basis on which to vacate the arbitrator's award. 9 U.S.C. § 10(a)(1)-(4); *see also* KRS 417.160. The trial court was required to deny Appellees' motion to set aside the order to arbitrate and was required to grant Chase's motion to confirm the arbitration award.

E. Chase Is Entitled To Relief Whether Considered Under The Federal Or Kentucky Arbitration Act.

Finally, while Chase has argued that the trial court and Court of Appeals erred under both the FAA and the KUAA, it is undisputed and the arbitrator correctly found that the controversy between the parties is to be governed by the federal act. R: 60-91 (Attachment, p. 15 [R: 81], to Motion to Dismiss Count 2 Pursuant to CR 12.02, or, Alternatively, To Stay Further Proceedings Pending Arbitration). A similar situation arose in *Schnuerle v. Insight Communications, Company*, 376 S.W.3d 561, 569 (Ky. 2012), where a party argued that the other had waived a federal law argument by having argued that state law controlled. This Court stated, however, "Clearly, the arbitration clause in this proceeding specifically provided that it was to be controlled, as applicable, by the FAA." Furthermore, "[w]hether state or federal law governs makes little practical

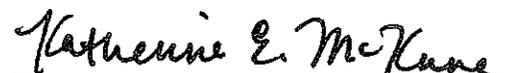
difference . . . because the Kentucky Uniform Arbitration Act (KUAA) contained in Kentucky Revised Statutes Chapter 417 is similar to and has been construed consistently with the FAA.” *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 550 (Ky. 2008). The lower courts’ rulings were in error and are inconsistent with Kentucky law. Chase is entitled to judgment.

CONCLUSION

As properly determined by the trial court upon review of the parties’ sworn testimony in 2004, Mr. Taylor signed the bank’s signature card, which contained an express agreement and assent to be bound by the terms of the bank’s Account Rules and Regulations, including an arbitration provision. Appellees failed to pursue a claim for arbitration until almost four years later, and Chase’s challenge to the timeliness of the arbitration was appropriately considered by the arbitrator, as Appellees had argued in the trial court. Upon substantive briefing of the parties, the arbitrator considered Appellees’ delay and dismissed the case against Chase. This decision was an “award” that was entitled to deference and enforcement under the FAA and Kentucky law.

Because the trial court erred in setting aside its 2004 order of arbitration and refused to enforce the arbitrator’s award in favor of Chase, this Court should reverse the affirming opinion of the Court of Appeals and direct the trial court to enter judgment for Chase.

Respectfully submitted,
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