[Cite as *Summit Constr. Co., Inc. v. Am. Arbitration Assn.*, 2010-Ohio-874.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
SUMMIT CONSTRUCTION CO., INC. Appellant v. AMERICAN ARBITRATION ASSOC., et al. Appellees	C. A. No. 24765 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009 01 0253

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

BELFANCE, Judge.

{¶1} Appellant, Summit Construction Co., Inc., appeals from the order of the Summit County Court of Common Pleas that denied Summit Construction's motion to appoint an arbitrator. For the reasoning set forth below, we dismiss the appeal.

I.

{¶2} In June 2004, Summit Construction Co., Inc. ("the Contractor") entered into an agreement with L.L.F.J.A.O., LLC ("the Owner") to be the general contractor for the Owner's project to build a hotel in the Akron area. The contract between the Owner and the Contractor was the American Institute of Architects' ("AIA") Standard Form Agreement Between Owner and Contractor.

{¶3} The parties' contract contained provisions providing that a dispute between the Owner and the Contractor would ultimately culminate in arbitration. Toward that end, the parties incorporated into their contract AIA Document A201, entitled "General Conditions of the

Contract for Construction" which provided that claims arising between the Owner and the Contractor were to be submitted to arbitration.

{¶4} Pursuant to section 4.4.1 of the contract, the parties were to submit their dispute to the architect as follows:

> "Claims *** , shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and the Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect."

{¶5} Section 4.5.1 further provided that any claim in connection with the contract "shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration[.]"

{¶6} Pursuant to section 4.6.1, the parties agreed that after decision by the architect or thirty days after submission of the claim to the architect, the claim was subject to arbitration. However, "[p]rior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5." The parties agreed that the arbitration process was to be carried out in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

{¶7} The project was completed and final payment was disbursed to the Contractor on March 27, 2006. Unfortunately, the Owner subsequently noticed several defects in the hotel, which it attributed to the Contractor's construction. Notwithstanding the above provisions relating to submission of the any dispute to the architect or mediation as a condition precedent to arbitration, on September 6, 2007, the Owner filed a demand for arbitration with the American Arbitration Association ("AAA"). In that demand, the Owner checked a box on the demand form requesting mediation prior to arbitration.

{¶8} After receiving communication from an AAA case manager with respect to mediation, the controller for the Contractor sent a letter to the case manager dated October 16, 2007 stating that it did not agree to mediation or arbitration. The Contractor's position was that neither mediation nor arbitration was appropriate until the project architect had been consulted.

{¶9} On October 23, 2007, the Owner's attorney sent an e-mail to the case manager expressing the Owner's interpretation of the contract that only claims arising before final payment on the contract were to be initially submitted to the architect. Because the Owner's claim arose after it made the final payment to the Contractor, the Owner believed that it was no longer required to submit the claim to the project architect.

{¶10} In light of the disagreement, the arbitration case manager sent a letter to both parties. She stated that after review of the parties' opposing positions, the AAA concluded that the Owner met the filing requirements for arbitration. Further, because the parties could not agree on whether mediation was appropriate, the AAA determined to proceed to arbitration of the claim relating to defects in the hotel. The case manager enclosed a list of possible arbitrators and instructed the parties how to indicate each parties' individual preference for an arbitrator. In the event that the parties did not reply by the deadline, the AAA would deem the listed arbitrators acceptable and appoint an arbitrator.

{¶11} The Owner participated in the selection process, but the Contractor did not. The AAA selected an arbitrator from the list given to the parties. The case manager communicated the name of the selected arbitrator to the parties and notified each of their right to object to the arbitrator. Neither the Owner nor the Contractor objected to the arbitrator. Additionally, the arbitrator submitted a disclosure statement that was forwarded to the parties identifying any

dealings he had with the Owner or the Contractor, counsel for the Owner, and anticipated experts and witnesses that could potentially lead to a conflict.

{¶12} On December 13, 2007, a preliminary hearing was held via conference call. The arbitrator, the case manager, and the Owner's attorney participated. However, a representative of the Contractor did not call in. When the case manager called the Contractor's office, she was told that the Contractor's president would not participate. The next day, the Contractor's controller informed the case manager via e-mail that the Contractor would not take part in mediation and arbitration, and that if the "harassing calls" did not stop, the Contractor would "contact the authorities."

{¶13} In July 2008, the Owner, through counsel contacted the project architect with regard to the Owner's claims against the Contractor. Thereafter, the Owner obtained a written statement from the architect that stated that he did not intend to consider the Owner's claims because the contract ended before the claim arose.

{¶14} The case manager sent notice to the Owner and the Contractor that a second preliminary hearing via conference call was scheduled for July 28, 2008. Again, a representative for the Contractor did not participate. During the conference call, the arbitrator scheduled the arbitration hearing for October 23 and 24, 2008.

{¶15} In mid-September 2008, the Contractor hired counsel. In a letter dated September 22, 2008, sent to the case manager and the Owner's counsel, counsel for the Contractor expressed his client's concerns. Counsel stated that the Contractor did not feel as though the arbitration procedure set forth in the parties' contract had been followed because the claim was not submitted to the architect before arbitration was demanded and that mediation was not held before arbitration. Counsel requested that the arbitration hearing set for October be postponed.

{¶16} In a follow-up letter to the case manager dated October 2, 2008, counsel for the Contractor explained that, subject to the approval of the arbitrator, he and opposing counsel agreed to postpone the scheduled arbitration hearing so that mediation could be conducted. He further proposed that arbitration be scheduled in February 2009 if needed. Finally, he stated, "the parties have agreed that there would be no need to submit this claim to the architect for review prior to any mediation and/or arbitration taking place."

{¶17} Following that, counsel for the Contractor expressed concern with respect to the suitability of the arbitrator who had been appointed in December 2007. The Owner did not agree. The AAA reviewed the parties' positions and determined that the appointed arbitrator was suitable and reconfirmed him as the assigned arbitrator.

{¶18} On January 12, 2009, the Contractor filed an application to appoint an arbitrator in the common pleas court. The motion was filed pursuant to R.C. 2711.04, entitled "Appointment of arbitrator," however, as an arbitrator had already been appointed; the Contractor asked the court to remove the arbitrator and appoint a new one.

{¶19} On February 12, 2009, the Owner and the Contractor participated in mediation. They were not able to resolve the claim.

{¶20} On March 19, 2009, the trial court issued an order staying arbitration and setting a hearing on the Contractor's application to appoint an arbitrator. After hearing the arguments of the parties, the trial court denied the Contractor's application to appoint an arbitrator. The trial court held that based on case law, "the question as to whether this matter should have been submitted to the architect as a condition precedent to arbitration was a matter for the arbitrator to decide." The trial court's order also lifted the stay of arbitration.

{¶21} The Contractor has appealed from the trial court's decision declining to appoint an arbitrator.

II.

Assignment of Error Number I

> "THE TRIAL COURT ERRED IN NOT REMOVING JOSEPH JEROME AS ARBITRATOR IN THAT HIS SELECTION WAS IN VIOLATION OF THE TERMS OF THE CONTRACT BETWEEN [THE CONTRACTOR] AND [THE OWNER]."

{¶22} In its specific assignment of error, the Contractor avers that the trial court erred in failing to *remove* the appointed arbitrator. However, the contractor applied to the trial court pursuant to R.C. 2711.04, which provides a mechanism to *appoint* an arbitrator. Despite this inconsistency, the substance of the Contractor's merit argument is that arbitration itself was improper because the conditions precedent to arbitration had not been met and the trial court had a duty to enforce the contract terms. This position is based upon the interpretation of the contract itself, not the procedural requirements of arbitration once arbitration is properly invoked and underway. Thus, its application to appoint an arbitrator appears inconsistent with its underlying position that the arbitration process itself was improperly invoked and improperly underway based upon the interpretation of the parties' contract.

{¶23} Prior to addressing the merits of the Contractor's argument, we are required to determine whether we have jurisdiction to consider this appeal. *No-Burn, Inc. v. Murati*, 9th Dist. No. 24577, 2009-Ohio-6951, at ¶7, citing *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. The Ohio Constitution limits this Court's jurisdiction to the review of final judgments or orders of the lower courts. Section 3(B)(2), Article IV, Ohio Constitution. R.C. 2505.02 outlines when an order of a lower court is a final order that may reviewed by this Court

{¶24} Relevant to the instant matter, R.C. 2505.02(B)(1) defines a final, appealable order as one "that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" In examining the "prevents a judgment" requirement of the statute, id., we conclude that that the trial court's denial of the Contractor's application is not a final, appealable order because it does not prevent a judgment; rather, it allows the matter to proceed to judgment. An order is deemed to prevent a judgment if the trial court's ruling disposes of the merits of the claim. See *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153. In this matter, the trial court's ruling did not resolve the Owner's underlying claim relating to the alleged defects in the Contractor's performance and the parties will proceed to the scheduled hearing of the Owner's claim after which the arbitrator will make an award. After the award has been made, the Revised Code provides a mechanism by which the Contractor may petition the common pleas court to vacate or modify the award. R.C. 2711.13. At that time, the Contractor may raise arguments concerning the arbitrator, and other procedural or substantive issues. R.C. 2711.10 (stating that the common pleas court shall vacate an award if the petitioner can demonstrate impropriety on the part of the arbitrator, such as fraud, corruption, or partiality). Once the common pleas court has entered a judgment confirming, vacating, or modifying the arbitrator's award, R.C. 2711.12, the Contractor may appeal that ruling. R.C. 2711.15. Conversely, if the Contractor prevails in the arbitration, the matter complained of in this appeal will become moot.

{¶25} Based on the facts presented in this appeal, the trial court's ruling is not a final, appealable order because it does not operate to prevent a judgment. See R.C. 2505.02(B)(1). Our ruling is in keeping with the public policy favoring resolution of claims through arbitration. See *Hollinger v. Key Bank Natl. Assn.*, 9th Dist. No. 22147, 2004-Ohio-7182, at ¶8.

III.

{¶26} The order from which Summit Construction Co., Inc. has appealed is not a final, appealable order. Thus, we do not have jurisdiction to consider the assignment of error and must dismiss the appeal.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

THOMAS M. SAXER, Attorney at Law for Appellant.

ROBERT VALERIAN, Attorney at Law, for Appellee.