Rel: March 15, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170504

Alliance Investment Company, LLC

v.

Omni Construction Company, Inc., a/k/a OCC, Inc; and KPS, LLC, a/k/a KP Sourcing, LLC

Appeal from Madison Circuit Court
(CV-17-900803)

BRYAN, Justice.

This appeal concerns who has the power to determine the location of an arbitration proceeding -- an arbitrator or the Madison Circuit Court. We conclude that, under the facts of

this case, the arbitrator has that power; thus, we reverse and remand.

In 2015, KPS, LLC, a/k/a KP Sourcing, LLC ("Kroger"), entered into a contract ("the prime contract") with Omni Construction Company, Inc., a/k/a OCC, Inc. ("Omni"), in which Omni agreed to build a grocery store for Kroger in Madison, Alabama. Omni then entered into a subcontract ("the subcontract") with Alliance Investment Company, LLC ("Alliance"), in which Alliance agreed to perform concrete work on the construction project. A dispute later arose regarding the payment owed Alliance for its work on the project, and Alliance subsequently sued both Kroger and Omni in the circuit court, alleging several claims. Kroger and Omni jointly filed a motion to stay the circuit-court proceedings and to compel arbitration of Alliance's claims. The prime contract and the subcontract each contain an arbitration provision; in moving to compel arbitration, Kroger and Omni cited both arbitration provisions. Alliance did not oppose the motion to compel arbitration. On August 28, 2017, the circuit court stayed the circuit-court proceedings and ordered the parties to arbitrate the case "in accordance with the terms of their agreements."

Alliance subsequently filed a demand for arbitration with the American Arbitration Association ("the AAA"). A dispute then arose regarding where the arbitration proceedings should he held. Alliance, an Alabama company, contended that the arbitration proceedings should be held in Alabama, while Kroger and Omni, which are both based in Ohio, contended that the arbitration proceedings should be held in Cuyahoga County, Ohio. Alliance argued that its claims are governed by a section of the arbitration provision in the subcontract regarding disputes that involve some aspect of the prime contract. That section requires such disputes to be resolved under the arbitration provision in the prime contract. The prime contract in turn requires disputes to be arbitrated in Alabama. However, Kroger and Omni argued that the claims are governed by a separate section of the arbitration provision in the subcontract that requires disputes to be arbitrated in Cuyahoga County, Ohio. On January 3, 2018, the AAA made an administrative determination that the arbitration would be held in Alabama and provided the parties with a list of potential arbitrators. Shortly thereafter, Kroger and Omni asked the AAA to reconsider its decision. On January 10, 2018, the AAA informed the parties that its administrative

determination regarding the location of the arbitration proceedings would be subject to review by the arbitrator.

However, on January 11, 2018, before the case could proceed to an arbitrator, Kroger and Omni filed in the circuit court a motion titled "Emergency Motion to Clarify Order Compelling Arbitration." In that motion, Kroger and Omni argued that the subcontract requires that the claims be arbitrated in Ohio. They further argued that the provision in the prime contract requiring arbitration to be held in Alabama is irrelevant. Accordingly, Kroger and Omni asked the circuit court to order the parties to arbitrate in Ohio. On January 22, 2018, the circuit court ordered that the arbitration proceedings be held in Ohio. In that order, the circuit court purported to amend its earlier order compelling arbitration. Alliance then appealed to this Court.

This Court reviews de novo an order granting or denying a motion to compel arbitration. Cartwright v. Maitland, 30 So. 3d 405, 408 (Ala. 2009). "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986) (quoting United Steelworkers

of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT & T, 475 U.S. at 648-49.

On appeal, Alliance argues that the circuit court lacked the authority to order, in its order of January 22, 2018, that the arbitration be held in Ohio. With respect to this argument, it is useful to discuss the procedural underpinnings of the circuit court's orders. Rule 4(d), Ala. R. App. P., provides that an order granting or denying a motion to compel arbitration is "appealable as a matter of right." Thus, as this Court stated in Bowater, Inc. v. Zager, 901 So. 2d 658, 667 (Ala. 2004), an order granting or denying a motion to compel arbitration is "due recognition as a 'judgment' under Rule 54(a), Ala. R. Civ. P." Therefore, the circuit court's order of August 28, 2017, compelling arbitration is a judgment under the Alabama Rules of Civil Procedure. Of course, the finality of judgments is important, and a circuit court may revisit a final judgment only in accordance with the proper procedures for doing so; Alliance contends that those procedures were not followed here. Alliance argues that

Kroger and Omni's "Emergency Motion to Clarify Order Compelling Arbitration" is in substance an untimely Rule 59(e), Ala. R. Civ. P., motion seeking to amend the August 28, 2017, judgment compelling arbitration. A Rule 59(e) motion to alter, amend, or vacate a judgment must be filed no later than 30 days after the entry of the judgment; Kroger and Omni filed their motion 136 days after the entry of the judgment compelling arbitration. Kroger and Omni counter that their motion was not a Rule 59(e) motion; rather, they say, it was a motion seeking a "clarification" of the judgment compelling arbitration that would not be subject to the 30-day time limit found in Rule 59(e). Although Kroger and Omni argue that the circuit court had the authority simply to clarify the order compelling arbitration, Alliance argues that the circuit court impermissibly amended the order compelling arbitration in response to an untimely Rule 59(e) motion. See, e.g., George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004) (discussing the limits of a trial court's power to revisit a judgment and reversing a circuit court's order purporting to modify a judgment when the order was not entered in response to a timely postjudgment motion).

However, as Alliance further argues, regardless of how the order of January 22, 2018, is characterized, the circuit court lacked the authority to order the parties to arbitrate in Ohio for a separate reason. It is undisputed that the AAA's Construction Industry Arbitration Rules govern the arbitration in this case. Both the prime contract and the subcontract provide that disputes must be decided under the Construction Industry Arbitration Rules. Rule 9(a) of the Construction Industry Arbitration Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." At its core, the dispute here concerns the scope of the arbitration provisions in the prime contract and the subcontract. In sum, Alliance argued to the AAA and later to the circuit court that its claims are governed by a section of the arbitration provision in the subcontract regarding disputes that involve some aspect of the prime contract. That section provides that the arbitration of such disputes must be held pursuant to the arbitration provision in the prime contract, which requires that the arbitration proceedings be held in Alabama. Kroger and Omni, however, maintained that

the section cited by Alliance does not apply and that Alliance's claims are actually governed by a separate section of the arbitration provision in the subcontract requiring that the arbitration proceedings be held in Ohio. Which argument is correct is not for this Court or the circuit court to decide; rather, that is an issue for the arbitrator to decide under Rule 9(a) of the Construction Industry Arbitration Rules. The circuit court lacked the authority to order that the arbitration proceedings be held in Ohio.

Kroger and Omni argue that the circuit court's exercise of authority in its January 22 order is supported by Sterling Financial Investment Group, Inc. v. Hammer, 393 F.3d 1223 (11th Cir. 2004). In that case, agreements between an employer and its employee contained provisions that plainly required that arbitration of disputes be held in Florida. After the employer fired the employee, the employee initiated arbitration proceedings against the employer with the National Association of Securities Dealers ("the NASD"). Despite the arbitration provisions calling for the arbitration proceedings to be held in Florida, the NASD assigned the arbitration to a panel in Texas, at the employee's request and over the employer's objection. The employer then filed a motion in the

federal district court asking that court to compel arbitration in Florida, pursuant to the terms of the arbitration provisions. The district court granted the employer's motion, and the employee appealed to the United States Court of Appeals for the Eleventh Circuit. That court determined that the NASD had disregarded the requirement in the arbitration provisions that the arbitration proceedings be held in Florida. Accordingly, the court concluded that the arbitration must be held in Florida.

We note that this Court addressed Sterling Financial in Ex parte Johnson, 993 So. 2d 875 (Ala. 2008). The relevant issue in Johnson was whether an arbitrator or a court should determine the availability of class-wide arbitration. After mobile-home owners initiated arbitration proceedings before the AAA against mobile-home companies, the companies filed declaratory-judgment actions asking a circuit court to determine whether class-wide arbitration was available under the terms of the arbitration agreements. In arguing to this Court that the circuit court could make that decision, the companies cited Sterling Financial. In response, this Court first noted that it "was not bound by the decisions of the United States Courts of Appeals or the United States District

Courts." Johnson, 993 So. 2d at 886. This Court then briefly distinguished the facts of Johnson from the facts of Sterling Financial. Id.[1]

Similarly, we again note that we are not bound by Sterling Financial. Moreover, this case is distinguishable from Sterling Financial. In Sterling Financial, the employee contended that, because both parties had agreed that arbitration was appropriate, all decisions should be made by an arbitrator. The federal district court in Sterling Financial noted that the employee's argument was bolstered by a rule of the NASD's Code of Arbitration Procedure, which contained the governing rules in that case. The relevant rule stated: "'The Director shall determine the time and place of the first meeting of the arbitration panel and the parties'" and "'[t]he arbitrators shall determine the time and place for all subsequent meetings.'" 393 F.3d at 1225. However, there

[1]The Court in Johnson ultimately decided that, under the arbitration rules applicable in that case, the arbitrator was authorized to make the initial determination regarding class-wide arbitration. The Court also noted that those rules contained a provision that specifically allowed for judicial review of that threshold decision before the remainder of the arbitration occurs. However, because the arbitrator had not yet made a decision regarding class-wide arbitration, the Court determined that judicial review was premature.

was no reference in Sterling Financial to an arbitration rule similar to the controlling rule in this case -- Rule 9(a) of the AAA's Construction Industry Arbitration Rules. Rule 9(a) broadly grants the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." That rule is distinct from any rule discussed in Sterling Financial in that it gives the arbitrator the power to decide which provision controls Alliance's claims, which in turn will determine whether the arbitration will be held in Alabama or Ohio. We do not find Sterling Financial to be persuasive.

Accordingly, we reverse the circuit court's order of January 22, 2018, and we remand the case.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Sellers, and Stewart, JJ., concur.

Mendheim, J., concurs in the result.

Mitchell, J., recuses himself.

MENDHEIM, Justice (concurring in the result).

I concur in the main opinion's conclusion that the trial court's January 22, 2018, order directing that the arbitration proceedings take place in Cuyahoga County, Ohio, must be reversed. I write separately to note some procedural hurdles that the parties and the trial court simply bypassed in this case.

First, the January 22, 2018, order was not an appealable order. The order did not completely dispose of any claim or party in the action. See Rule 54(b), Ala. R. Civ. P. The only way the order could be an appealable judgment is if, as the main opinion observes, it was an order granting or denying a motion to compel arbitration, which is appealable under Rule 4(d), Ala. R. App. P. However, the January 22, 2018, order was not an order compelling arbitration. The trial court ordered arbitration on August 28, 2017, and the parties had been engaged in the arbitration process for over four months when Kroger and Omni filed their "Emergency Motion to Clarify Order Compelling Arbitration." The January 22, 2018, order merely purported to settle a disagreement between the parties concerning which contract governed their dispute and, as a

result, where the arbitration proceedings would take place. Therefore, the order was not appealable under Rule 4(d).

In my view, Alliance was not without a remedy. It could have filed a petition for a writ of mandamus. This Court, moreover, previously has used its inherent authority to treat an appeal as a petition for a writ of mandamus where appropriate. See, e.g., Slamen v. Slamen, 254 So. 3d 188, 192 (Ala. 2017) (treating an appeal from a trial court's discovery order not related to the issue of arbitration when the order was issued before the trial court had ruled on a pending motion to compel arbitration as a petition for a writ of mandamus); F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So.2d 366, 372 (Ala. 2006) (explaining this Court's inherent authority to treat an appeal as a petition for a writ of mandamus when the circumstances warrant); and Morrison Rests., Inc. v. Homestead Vill. of Fairhope, Ltd., 710 So. 2d 905, 906 (Ala. 1998) (stating, before the adoption of Rule 4(d), that "[t]his Court has previously held that a petition for a writ of mandamus is the appropriate method of challenging an order referring a case to arbitration," and treating Morrison's appeal as a petition for the writ of mandamus). I believe that treating Alliance's appeal as a

petition for a writ of mandamus would be appropriate in this instance.

Further, I note that our outcome is compelled because the trial court lacks the authority to intercede in an ongoing arbitration process. There is no Alabama jurisprudence approving a "motion to clarify" an arbitration order, and Kroger and Omni have not provided any authority in their briefs for doing so. This lack of authority is the result of the procedures for arbitration outlined in the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"), as well as the United States Supreme Court's application of the FAA, both of which bind this Court.

Once a trial court determines that arbitration has been properly invoked, a stay in the court proceedings is mandatory under 9 U.S.C. § 3 of the FAA.[2] The United States Supreme

[2]Section 3 of the FAA provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,

Court has made it clear that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983). This Court has confirmed that responsibility. See Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983, 990 (Ala. 2004) (explaining that, "when a trial court compels arbitration, that court is required by federal statute to stay all proceedings, see 9 U.S.C. § 3, ... as to any claims that fall within the scope of an arbitration clause" (footnote omitted)).

In general, the purpose of the stay is to suspend litigation of the dispute until after the decision of the arbitrator. See, e.g., Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc., 660 F.3d 988, 997 (7th Cir. 2011) ("When a court grants a § 3 stay pending arbitration, it retains jurisdiction over a matter so that it can effectuate the decision of an arbitrator or handle additional matters or claims that were not subject to arbitration."); Jolley v. Paine Webber Jackson & Curtis, Inc., 864 F.2d 402, 405 (5th Cir.), supplemented, 867 F.2d 891 (5th

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providing the applicant for the stay is not in default in proceeding with such arbitration."

Cir. 1989) ("While an order granting a stay postpones active litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or, in some cases, to renew the litigation despite the arbitration award.").

In this case, the trial court implicitly lifted its stay of litigation to rule on the parties' disagreement over the location of the arbitration proceedings. However, under the FAA, there are only two situations in which a trial court is permitted to interfere with the arbitration process before confirmation of the arbitration award. First, 9 U.S.C. § 5 provides that if there is a breakdown between the parties for the appointment of an arbitrator in the manner provided in the arbitration agreement, then the trial court can appoint an arbitrator.[3] Section 5 of the FAA is the reason this Court

[3]Section 5 of the FAA provides:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall

reviewed a trial court's order in Okay v. Murray, 51 So. 3d 285 (Ala. 2010) (reviewing a trial court's appointment of an arbitrator after the parties were unable to agree on an arbitrator pursuant to the terms of the arbitration agreement). Second, 9 U.S.C. § 4 permits a trial court to intervene when there is a complete breakdown in the arbitration process, which is indicated by one party's neglect or refusal to participate in any way in the process.[4] See,

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> designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

[4]Section 4 of the FAA provides, in pertinent part:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition ... [a] district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court ... upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, ... shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed ... to the trial thereof. ... If the jury find that an agreement for arbitration was made in writing and that there is a default in

e.g., Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co., 304 F.3d 476, 486 (5th Cir. 2002) (observing that, "[u]nder the FAA, jurisdiction by the courts to intervene into the arbitral process prior to issuance of an award is very limited" and that "[s]ection 4 of the FAA provides for a court's role in the arbitral process prior to issuance of an award in the event of a claimed 'default' of that process pursuant to a valid agreement"); Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414-15 (2d Cir. 1980) ("Under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a district court does not have the power to review an interlocutory ruling by an arbitration panel. ... The language of the Act is unambiguous: it is only after an award has been made by the arbitrators that a party can seek to attack any of the arbitrators' determinations in court, by moving either to vacate the award, see 9 U.S.C. § 10, or to modify or correct it, see id. at § 11. Thus,... a district court is without authority to review the validity of arbitrators' rulings prior to the making of an award.").

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proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

Neither of the situations described in §§ 4 and 5 of the FAA occurred in this case. The parties participated in the arbitration process, and this was not a dispute over the method of the appointment of the arbitrator. Accordingly, the trial court lacked the authority under the FAA to interfere with the arbitration process under the guise of Kroger and Omni's "motion to clarify" the August 28, 2017, order compelling arbitration.

In re Ihi, 324 S.W.3d 891 (Tex. App. 2010), was a case with a similar scenario in which the parties disagreed, based on the language in two different contracts, about whether the arbitration should take place in Houston, Texas, or San Diego, California. After the American Arbitration Association ("the AAA") issued a "locale order" stating that arbitration would occur in San Diego, one of the parties filed a "motion to clarify" in the trial court, and the trial court directed that arbitration take place in Houston. Applying the FAA, the Texas Court of Appeals concluded that the AAA's ruling on the location of the arbitration proceedings was an interlocutory ruling and that, therefore, the trial court did not have the power to review it. 324 S.W.3d at 894. The same conclusion follows in this case.

Beyond the strictures of the FAA, the issue presented by the "motion to clarify" was not the type the United States Supreme Court has stated is for the court, rather than the arbitrator, to decide.

> "Gateway procedural issues 'are presumptively not for the judge, but for an arbitrator, to decide.' Howsam [v. Dean Witter Reynolds, Inc., 537 U.S. 79,] 84, 123 S.Ct. 588 [(2002)].
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> "Gateway substantive issues, on the other hand, are issues 'for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).
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> "'....'
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> "... And 'if there is doubt about [whether the arbitrator should decide a certain issue,] we should resolve that doubt "in favor of arbitration."' [Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402 (2003)] (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985))."

Federal Nat'l Mortg. Ass'n v. Prowant, 209 F. Supp. 3d 1295, 1309 (N.D. Ga. 2016).

Determining the location of arbitration proceedings concerns "what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to

answer that question." Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003) (plurality opinion) (citation omitted) (addressing "whether the arbitration contracts forbid class arbitration"). In other words, venue for an arbitration proceeding is a procedural, rather than a substantive, issue. See, e.g., Bamberger Rosenheim, Ltd. v. OA Dev., Inc., No. 1:15-CV-04460-ELR, Aug. 24, 2016 (N.D. Ga. 2016) (not selected for publication in F. Supp.) (observing that "[i]nterpreting Howsam [v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2003),] and Green Tree, a number of courts have come to the conclusion that arbitral venue is a procedural issue for the arbitrator to decide" and citing several decisions from federal circuit courts of appeal, including the United States Court of Appeals for the Eleventh Circuit in McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307, 1310 (11th Cir. 1999)). Accordingly, established federal law dictates that this issue belongs to the arbitrator, not the trial court.

Based on the foregoing, it is clear that the trial court should not have entertained or ruled upon Kroger and Omni's "motion to clarify" the August 28, 2017, order compelling arbitration. I therefore concur in the result reached by the main opinion.