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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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TIMOTHY R. CALFO vs.
DONNA L. JONES a/k/a DONNA L. CALFO a/k/a DONNA L. COLEMAN

Alternative Dispute Resolution Clause

No issue of fact present in whether an agreement to arbitrate existed.

Case No.: GD-22-011544. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. March 17, 2023.

Pa.R.C.P. 1925(b) OPINION

Procedural History

On 9/25/2022, Timothy Calfo ("Calfo") filed a seven-count complaint that included a Declaratory Judgement, Preliminary and Permanent Injunction, Breach of Contract, two counts of Unjust Enrichment, Fraud, and Conversion, against his mother Donna L. Jones a/k/a Donna L. Calfo a/k/a Donna L. Coleman ("Jones"). The complaint avers various disputes between Jones and Calfo related to the ownership and sale of Calfo Properties, LLC, ("Calfo Properties") and a commercial property located at 91 Terence Dr. Pittsburgh, PA 15236, ("Terence Drive") owned by Calfo Properties and rented to Calfo's plumbing and air conditioning business, ("Calfo Mechanical") that was owned solely by Calfo.

Additionally, there are disputes regarding repairs and improvements to the residential property located at 5315 Adobe Dr., Pittsburgh, PA 15236, ("Residence") which is owned solely by Jones but occupied by both parties as a family residence prior to their disputes.

There is also a dispute regarding an alleged agreement to sell the residential property and the sale price. Calfo also alleges that Jones was interfering with the operation of his company, Calfo Mechanical, a business of which she had no legal interest in.

Calfo's complaint had ten (10) exhibits attached which are as follows:

• Exhibit "A": An Agreement for Sale for the Residence between the Seller Jones and the Buyer Calfo for $275,000.00, dated 9/20/2021. The agreement only contains Calfo's signature.

• Exhibit "B": An Addendum to Exhibit "A", an Agreement of Sale for the Residence which was not signed by either Calfo or Jones.

• Exhibit "C": An Agreement of Sale for Commercial Property at Terence Drive, between Seller Gob and Buyers Jones and Calfo for $315,000.00, dated 10/07/2017. The agreement is signed by all parties.

• Exhibit "D": An Operating Agreement for Calfo Properties dated 1/12/2017, Calfo and Jones are named as members with each owning a 50% membership interest. This Agreement is not signed.

• Exhibit "E": An Amendment to Exhibit "C" and an Agreement of Sale of Commercial Property located at Terence Drive, where the names of Calfo and Jones are listed as Buyers, dated March 2017. This Agreement is not signed by any party.

• Exhibit "F": An Operating Agreement for Calfo Properties dated 1/12/2017, Jones is listed as 100% sole member. Jones signed this agreement and Calfo is not referenced in the agreement.

• Exhibit "G": An Assignment of Agreement of Sale of Commercial Property for Terence Drive dated 3/09/2017. Calfo and Jones assign their individual rights as buyers to Calfo Properties. Both Calfo and Jones signed the agreement as individual buyers, and Jones also signed as the sole member/owner of Calfo Properties.

• Exhibit "H": A Mortgage dated 4/18/2017, from Calfo Properties to Brentwood Bank for $252,000.00, signed by Jones as sole member of Calfo Properties. Jones also signed an LLC Acknowledgement certifying that she was the sole member of the Calfo Properties.

• Exhibit "I": A Storm Sewer Right of Way between Calfo Properties to Pleasant Hills Borough dated 1/30/2019, signed by Calfo for Calfo Properties. This agreement does not designate Calfo as a member but rather on behalf of the LLC.

• Exhibit "J": An Open-End Mortgage Agreement for $660,000.00 to Huntington National Bank dated 6/30/2020, in which the property at Terence Drive was collateral. It was signed by Calfo and Jones as members of Calfo Properties. The LLC acknowledgement was only signed by Jones, indicating that she was authorized to act on behalf of Calfo Properties.

• Exhibit "K": An Open-End Mortgage Agreement for $660,000.00 from Jones to Huntington National Bank dated 6/30/2020, in which the Residence was the collateral property. The agreement was signed by Jones individually.

No other exhibits were attached to the Calfo Complaint.

On 10/28/2022, Jones filed Preliminary Objections to Calfo's Complaint averring six objections which are as follows: 1) Motion to Dismiss for Improper Service, 2) Motion to Dismiss Based on Agreement for Alternative Dispute Resolution under Pa. R.C.P. 1028(a)(6), 3) failure to attach copies of a writing in which the claim is based on, 4) a demurrer to the preliminary and permanent injunctions, 5) a demurrer to the fraud count due to lack of specificity to allege the necessary elements to establish a fraud claim, and 6) a motion for a more specific statement for Counts VI and VII to support a claim for punitive damages.

On 1/13/2023, after reviewing the complaint, briefs, and oral argument, I ruled that Preliminary Objection I regarding improper service was moot, I overruled Preliminary Objections II – VI, and sustained Preliminary Objection VII with leave to amend.

Jones filed an appeal to my 1/13/2023 order on 1/20/2023 and filed her concise statement of errors on 2/6/2023. Jones' appeal is limited to my overruling her one preliminary objection requesting dismissal and transfer to arbitration pursuant to Exhibit "D" of Calfo's Complaint. This preliminary objection was brought pursuant Pa.R.C.P. 1028(a)(6) which is essentially a petition to compel arbitration.

Standard of Review

"When presented with a petition to compel arbitration, the trial court must determine whether an agreement to arbitrate the controversy exists." Davis v. Ctr. Mgmt. Grp., LLC, 192 A.3d 173, 182 (2018). "If a valid arbitration agreement exists between the parties and appellants' claim is within the scope of the agreement, the controversy must be submitted to arbitration." Id. at 182-3. "Arbitration is a matter of contract and, as such, it is for the court to determine whether an express agreement between the parties to arbitrate exits." Smith v. Cumberland Grp., Ltd., 687 A.2d 1167, 1171 (1997). In order to find an enforceable contract, all the essential elements must be found. Johnston the Florist, Inc. v. TEDCO Const. Corp., 657 A.2d 511, 516 (1995). "We must examine whether both parties have manifested an intent to be bound by the terms of the agreement, whether the terms are sufficiently definite, and whether consideration existed. If all three of these elements exist, the agreement shall be considered valid and binding." Id.

Rule 1028(c)(2) states that if a party's preliminary objections raise an issue of fact, "the court shall consider evidence by depositions or otherwise." See Pa.R.C.P. 1028(c)(2). The rule does not mandate that a trial court order discovery between the parties when the preliminary objections do not raise an issue of fact. Le Vin Co., LLC v. Blue Star Wine Co., No. 1062 EDA 2017, 2018 WL 1442540 (Pa. Super. Ct. Mar. 23, 2018).

Discussion

Jones takes the mistaken position that this case must be dismissed and remanded to arbitration based on Exhibit "D" of the Complaint, an alleged Operating Agreement for Calfo Properties dated 1/12/2017. Significantly, the agreement is not enforceable since it does not show the intent of the parties to be bound by it as required in Johnston the Florist. This is apparent and not an issue of fact because the operating agreement that purports to provide equal ownership to both parties and would require arbitration, is not signed by either party. Therefore, no further discovery was necessary.

In the nature of having your cake and eating it too, Jones denies that Calfo is a member of Calfo Properties, and that Jones is the sole member/owner relying upon the other Operating Agreement, also dated 1/12/2017. This other operating agreement, Exhibit "F", contains only Jones' signature and purports that Jones is the sole member of Calfo Properties. The signature on that page is not an issue of fact as it is only signed by Jones.

Jones' reliance on Waters v. Express Container Servs. of Pittsburgh, LLC, 284 A.3d 1217 (2022), reargument denied (Dec. 14, 2022) is misplaced. The facts in Waters are clearly distinguishable from the case sub judice.

In Waters, both parties admitted that there was a binding contract which contained an arbitration clause for disputes arising under the contract. The issue was whether a personal injury claim fell under the terms of the contract, not whether there was a contract. Here, Calfo claims he is an owner/member of Calfo Properties, but has not attached any signed operating agreement or other document that clearly assigns him an interest in it. In fact, Exhibit "D", the alleged Operating Agreement of Calfo Properties, which purports to provide Calfo 50% ownership is not even signed by him, let alone by Jones. In addition, Calfo avers that Jones had fraudulently signed his name to the assignment of the purchase of the property at Terence Drive to Calfo Properties. While Jones vehemently denies that Calfo is a member, and avers she is the sole member of Calfo Properties, as evidenced by the Operating Agreement signed by Jones, she still argues that Calfo should be bound by the agreement even though he is not a member.

I would also point out that Jones' stance that she is the sole owner of the Calfo Properties is logically contrary to her position that this matter is subject to compulsory arbitration. Jones avers that Calfo's Complaint and lawsuit should be dismissed and transferred to arbitration based solely on the Operating Agreement that is not signed by either party. More importantly, Jones argues that Calfo is bound to arbitration by an agreement that she does not recognize as being otherwise binding upon Calfo when she claims that Calfo has no membership interest in Calfo Properties. It logically cannot be both ways.

Jones' rationale for compulsory arbitration is clearly flawed when you examine the terms of the only signed Operating Agreement containing Jones' signature. Exhibit "F". Jones acknowledges in her briefs that the terms in the unsigned and signed operating agreements are identical except for who are the members.

In Exhibit F, the signed agreement in which Jones is the sole member, we find the following controlling terms regarding Membership:

Article I Definitions: i. Member: shall mean Donna Jones, and each other entity or person that may hereafter be admitted to the Company as a member.

Article II Formation Purpose and Duration: 2.11: Members: The names, present mailing address, units and percentages of each member is set forth in Exhibit "A". which lists Donna Jones as the sole member with 100% ownership.

Article V Management of Company by Members: 5.9 Decisions Requiring Unanimous Member Approval: (b.) To admit a new member.

Article VIII Transfer of Units: 8.2 Admission of additional Members: Additional members may be admitted to the Company from time to time with the prior written approval of the Members. Each newly admitted Member shall execute such documentation as the existing Members require to evidence ownership in the Company and shall be bound by the terms and provisions of this Agreement. **Any purported admittance of new members other than in accordance with this Section 8.2 shall be null and void.** (Emphasis added)

The Operating Agreement's member admission requirement states that a new member is to obtain the unanimous approval of all members, and the new member will execute documentation that proves ownership and their consent to be bound by the terms of the operating agreement. I found it significant that none of the exhibits attached to the complaint seemed to comply with the above contractual requirements. **Any purported admittance of new members other than in accordance with Section 8.2 shall be null and void.** Exhibit "F"

Significant to this question is Jones' denial of Calfo's Membership status or unwillingness to stipulate that she had consented to admit Calfo as a new member. Since Jones takes the position that Calfo is not a member of Calfo Properties, she cannot use the Operating Agreement which only applies to its members to enforce the compulsory arbitration clause. It cannot be read both ways. The language of the operating agreement is clear that arbitration is for resolving disputes between members, not individuals claiming to be a member.

Jones also incorrectly argues that pursuant to Pennsylvania's Uniform Limited Liability Act of 2016, I am required to find that Calfo has assented to the operating agreement requiring compulsory arbitration. Section 8816(b), Application of operating agreement, deemed assent, states, "A person that becomes a member of a limited liability company is deemed to assent to the operating agreement." The statute only applies if Calfo is a member of the limited liability company. This rationale fails for the same reasons described more fully above, i.e., Calfo has not proven he is a member nor has Jones admitted or stipulated he is a member of Calfo Properties. If Jones had been willing to stipulate that Calfo was a member of Calfo Properties, I may have ruled differently. Again, Jones cannot have it both ways, if she wants to enforce the arbitration clause of the operating agreement, Calfo must be deemed a member. If Calfo is not a member there can be no assent to the operating agreement which would require compulsory arbitration.

Conclusion

In conclusion, I overruled Jones' preliminary objection to dismiss based on an alternative dispute resolution clause because there is not a signed operating agreement that demonstrates both parties intended to be bound to it and its arbitration clause. Since there is not an operating agreement signed by both Calfo and Jones which made Calfo a member of Calfo Properties,

and no documentation showing that Jones consented to Calfo as a member, I had to overrule Jones' preliminary objection. I did not find an issue of fact present in whether an agreement to arbitrate existed. For these reasons I should be upheld.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

COMMONWEALTH OF PENNSYLVANIA vs. RICHARD CUNNINGHAM, Appellant

PCRA Petition

Failure to qualify for the new facts unavailable at time of trial exception to the time bar set forth in the PCRA.

Case No.: CP-02-CR-15297-2006. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Satler, J. February 16, 2023.

OPINION

Appellant Richard Cunningham has appealed this Court's denial of his Amended Post Conviction Relief Act Petition without hearing, pursuant to Pa. R.C.P 907.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Regarding the events upon which the Appellant based his Petition and this Appeal, Appellant is serving a life sentence for convictions following a bench trial before the Honorable Lester G. Nauhaus, who has since retired on December 31, 2021. Following closing Arguments on July 7, 2008, Judge Nauhaus convicted Appellant of two (2) counts second degree murder and one count each of burglary and conspiracy.

The incident leading up to his trial and conviction occurred on February 20, 2005, when the surviving victim, Kevilin Middleton, hosted a party at his Penn Hills home to celebrate the birthday of T.C. Lyerly. His brother, Chaoe Davis, was in attendance. Both Lyerly and Davis did not survive the incident.

For entertainment, Middleton arranged to have three exotic dancers perform at the party, but following their arrival, victim Middleton objected to the appearance and build of one would be dancer, Angel Potter. An argument ensued after Potter took the payment of $200.00 from Middleton's grasp. Although the money was returned to Middleton, another dancer was overheard making a phone call and giving Middleton's address to the person at the other end. Angel Potter also made a phone call immediately after her companion.

After a time, a van pulled up outside the party and four men got out. The third dancer, Helen McCorckle, identified three of them; Afron Brown, Ramone Coto and her ex-boyfriend, Erik Surratt. The fourth gentleman was wearing a ski mask. She recalled that both Ramone Coto and Erik Surratt were carrying guns. She witnessed Alfron Brown and the masked man enter the house. Later, Appellant Richard Cunningham was identified by dancer Geneva Burrell as the man in the ski mask. Appellant's fingerprint and right palmprint were recovered from the interior of the storm door linking him to the crime scene. Shots were fired within the house striking and killing Lyerly and Davis and leaving Middleton injured.

Bullets linked to Surratt's weapon were recovered from one body. A bullet recovered from the other body was discharged from .38 or .357 magnum caliber weapon. After trial, Appellant was acquitted of the charges of attempted murder, aggravated assault and carrying a firearm without a license.

While serving the Court's sentence, Appellant learned of co-defendant Erik Surratt's resentencing hearing on April 19, 2019, again before Judge Nauhaus. Erik Surratt was the only one of the four participants eligible for resentencing because he was six (6) months short of his eighteenth (18th) birthday on the date of these shootings.

At the hearing, Judge Nauhaus reminded Surratt that he was the only one of the four convicted of the crimes of February 20, 2005 incident eligible for re-sentencing, and only because of six (6) months that afforded him an opportunity to lessen his sentence, which Surrat acknowledged. This exchange followed:

The Court: Let's assume that you do get paroled. What do you say to these other three, because they aren't going anywhere?

The Defendant: Definitely because of my action, because they didn't know – they didn't really know because I didn't know what I was going to do once I got there.

The Court: Come on. You had a gun.

Defendant: I know.

The Court: You drove from Braddock to Penn Hills with a gun in the car.

The Defendant: Yeah, actually I was coming – we were coming to get the girl.

The Court: I know that, but you walked in the house with the gun.

The Defendant: Yes, I did.

See hearing transcript pgs. 7-8.

That statement by Surratt is the basis for this Appeal. In his Petition, he argues, "Cunningham's convictions and sentence resulted from the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced," which 42 Pa.C.S. Section 9543(a){2)(ii) which exception would entitle him to relief in the form of a new trial that he requested.

The Petition continues "The Argument here is straightforward; Surratt's statement at his resentencing hearing – 'I didn't know what I was going to do once I got there' – is a fact that, if available at the time of trial, would negate the mens rea necessary to make out the conspiracy and burglary charges. He argues:

"With that evidence, the mens rea for the predicate felonies i.e. burglary and conspiracy – would have been much less certain to support those predicates and Cunningham's resulting felony – murder conviction.

This is a post-trial exculpatory fact that would have changed the outcome of the trial if it had been introduced. A new trial is due for the fact finder to weigh the fact along with the others."

This Court did not find the above co-defendant's statement to be an exculpatory fact favoring the Appellant's outcome at trial as he characterizes it in his Petition. In fact, the identical argument was made in a Petition filed by co-defendant, Ramone

Coto, which was also denied by Judge Nauhaus prior to his retirement and Judge Nauhaus' denial, was affirmed by the Superior Court.

CONCISE STATEMENT AND MATTERS COMPLAINED OF ON APPEAL

In response to this Court's Order, pursuant to Ps R.A, P. 1925(b), Appellant filed the Matters Complained of as follows;

1. Did the Court err in dismissing Appellant's P.C.R.A. when jurisdiction existed under 42 Pa.C.S. section 9545(b)(l)(ii) the newly discovered fact exception to P.C.R.A. time bar?

2. Did the lower Court err in dismissing Appellant's PCRA where Appellant pleaded facts the show exculpatory evidence had become available since the time of trial and that evidence would have changed the outcome of the trial had it been introduced?

STANDARD AND SCOPE OF REVIEW

The standard of review of a Court's denial of a Post-Conviction Relief Act Petition is whether the decision is supported by the record and free from legal error. Commonwealth v Miller, 102 A.3d 988,992(Pa.Super.2014). The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. Id.

DISCUSSION

To obtain reversal of a PCRA Court's decision to dismiss a Petition without hearing, an Appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief or the Court otherwise abused its discretion in denying a hearing. Commonwealth v. D' Amato, 856 A2d 806, 820(Pa. 2004).

Four (4) individuals participated in the events of February 20, 2005, which led to shootings inside Middleton's home and led to deaths and injuries. All four (4) individuals were tried before Judge Nauhaus and convicted of various crimes in 2008. Appellant Cunningham was not the only co-defendant to file a PCRA Petition upon learning of the statements made by co-defendant Surrat at his resentencing hearing. Co-defendant, Ramone Coto, filed his Petition relying on the same statement of Surrat that Appellant Cunningham now hopes will persuade the higher Court to reverse this Court's denial of his PCRA petition.

In Coto's case the Commonwealth argued, as here, that Surratt's statement amounts only to Surratt being a new source of facts that were previously known to Appellant because Appellant Cunningham himself, as did Coto, already articulated the substance of those facts in his own statements to police following the crime.

In the Coto Appeal, the Superior Court noted that the PCRA Court (Judge Nauhaus in Coto's case) did not abuse its discretion. The PCRA Court (Judge Nauhaus) had presided on this case for more than a decade and was the factfinder at Appellant's non-jury trial. The Superior Court observed that the Court possesses "familiarity with the case to likely assist the proper administration of justice on post-conviction proceedings." Commonwealth v Abu-Jamal, 720 A2d at 90. Moreover, the Court's findings are supported by the record, and its decision to dismiss Appellants petition is free of legal error."

Appellant claims herein that his Petition qualifies for the New Facts Exception to the Act's time bar and, as did Ramone Coto before him, relies on the testimony of Erik Surratt from his resentencing hearing. Contrary to Appellant's assertion that Surratt produced new facts that would have changed the outcome of the trial, Mr. Coto, Mr. Surratt and Appellant herein were all in their own ways participants in the crime, with firsthand knowledge of their involvement and intentions.

Furthermore, Mr. Coto and Mr. Cunningham both had explanations to the police as to persuade them that they that did not participate in the crime. This Appellant denied any involvement in the crime in his statements to the police. He simply was not there. His version of his participation or lack thereof is something that he alone has the unique knowledge. Thus, Mr. Surratt's statement that he did not know what he was going to do when entering the crime scene is merely a new source for facts that Cunningham himself is familiar.

CONCLUSION

The dismissal without hearing of Appellant Richard Cunningham's PCRA Petition by this Court should be affirmed as it does not qualify for the new facts unavailable at time of trial exception to the time bar set forth in the Post-Conviction Relief Act, as contemplated by the Superior and Supreme Courts of Pennsylvania.

BY THE COURT:
/s/The Hon. Jennifer Satler