



In the Missouri Court of Appeals Eastern District

WRIT DIVISION I

STATE ex rel.	)	
TODD HEWITT,	)	No. ED100479
	)	
Relator,	)	Cause No. 12SL-CC01973
	)	
vs.	)	
	)	
HONORABLE KRISTINE KERR,	)	
Judge, Circuit Court for	)	Writ of Mandamus
St. Louis County Missouri,	)	
	)	
Respondent.	)	Filed: October 22, 2013

Introduction

Relator, Todd Hewitt, (“Hewitt”) seeks to direct the trial court (“Respondent”) to deny a motion to compel arbitration filed by defendant, the St. Louis Rams Partnership (“the Rams”) in the action pending before the trial court. A preliminary order in mandamus was issued staying proceedings pending resolution of this writ action. In accordance with Rule 84.24 (j), the Court dispenses with further briefing and oral argument. The arbitration provision contained in the employment agreement entered into between Hewitt and the Rams provides for the arbitration of any dispute between the parties by the Commissioner of the National Football League (“Commissioner”), whose decision shall be final, binding, conclusive and unappealable. This provision is unconscionable and unenforceable. The remainder of the arbitration provision is enforceable. Relator’s petition for a writ of mandamus or writ of prohibition is denied, and the

Preliminary Order in Mandamus is hereby quashed. The arbitration may proceed, consistent with this opinion, upon the selection of an impartial arbitrator by the trial court.

Facts and Procedural History

Todd Hewitt was an employee of the Rams and worked as the Equipment Manager for the football team. Hewitt and the Rams entered into an employment agreement in November 2008. Hewitt's employment relationship with the Rams terminated on January 7, 2011. Hewitt was 54 years old at the time the employment relationship was severed. Paragraph Seven of the agreement contained a provision requiring the Rams and Hewitt to refer any dispute between them to the Commissioner for resolution ("Arbitration Provision"). That paragraph provides in its entirety:

Hewitt agrees to abide by and to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League and by the decisions of the Commissioner of the National Football League, which shall be final, binding, conclusive and unappealable. The Rams and Hewitt also severally and mutually promise and agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision and after due notice and hearing, at which both parties may appear, the decision of said Commissioner shall be final, binding, conclusive and unappealable, and the Rams and Hewitt severally and jointly hereby release the Commissioner and waive every claim each or both have or may have against the Commissioner and/or the National Football League, and against every director, partner, officer, and stockholder of every Club in the National Football League, for all claims and demands whatsoever arising out of or in connection with any decision of the Commissioner of the National Football League.

Hewitt filed a petition seeking damages for alleged age discrimination under the Missouri Human Rights Act, Section 213.010¹ (MHRA). Thereafter, the Rams filed a motion to compel arbitration of Hewitt's claims, citing the terms of the Arbitration Provision. After a hearing, the trial court issued a written ruling on January 8, 2013 granting the Rams' motion to compel arbitration. In a Supplemental Order and Judgment dated January 17, 2013, the trial court

¹ All statutory references are to RSMo 2000 unless otherwise noted.

dismissed Hewitt's petition without prejudice to allow for an appeal of the judgment and order compelling arbitration. Hewitt appealed the trial court's judgment to this Court. We reversed the Supplemental Order and Judgment concluding that when arbitration proceedings are compelled, the trial court should stay the proceedings in its own forum, and not dismiss them. Hewitt v. St. Louis Rams Partnership, 2013 WL 5329574 (Mo. App. E.D. Sept. 24, 2013). In our opinion we stated that Hewitt may raise his issue in an extraordinary writ proceeding or by appeal following arbitration. Hewitt now brings his Petition for Writ for Mandamus or Writ of Prohibition. On September 30, 2013, we issued a Preliminary Order in Mandamus.

Standard of Review

Our power to issue remedial writs derives from Article V, Section 4.1 of the Missouri Constitution. State ex rel. Dir. of Revenue v. Kinker, 209 S.W.3d 1, 2 (Mo. App. E.D. 2006) citing State ex rel. Dir. of Revenue v. Mobley, 49 S.W.3d 178, 179 (Mo. banc 2001).

A writ of mandamus may issue under very limited circumstances as it is a hard and fast unreasoning writ and is reserved for extraordinary emergencies. Norvall v. Whitesell, 605 S.W.2d 789, 791 (Mo. banc 1980). The function of the writ of mandamus is to enforce, not to establish, a claim of right; the office of the writ is to execute, not to adjudicate. State ex rel. Kiely v. Schmidli, 583 S.W.2d 236, 237 (Mo. App. W.D. 1979). To warrant control by mandamus, there must be an existing, clear, unconditional legal right in relator, and a corresponding present, imperative, unconditional duty upon respondent, and a default upon respondent therein. Id.

A writ of prohibition is available: (1) to prevent a usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. State ex rel. Houska v. Dickhaner, 323

S.W.3d 29, 32 (Mo., 2010), citing State ex rel. Missouri Public Defender Comm'n v. Pratte, 298 S.W.3d 870, 880 (Mo. banc 2009).

Discussion

In his Suggestions in Support of his Petition for Writ of Mandamus or Prohibition, Hewitt bypasses any discussion of our standard of review and proceeds as if our review of his writ petition is mandatory. Such is not the case. Our review of writ petitions is discretionary and limited. State ex rel. Missouri Growth Assn. v. State Tax Commission, 998 S.W. 2d 786, 788 (Mo. banc 1999); State ex rel. Horn v. Ray, 325 S.W. 3d 500, 504 (Mo. App E.D. 2010). As we noted in Hewitt's appeal from the Supplemental Order and Judgment issued by the trial court, a party challenging a judgment compelling arbitration may raise that issue in an extraordinary writ proceeding or by appeal following arbitration. Hewitt v. St. Louis Rams Partnership, 2013 WL 5329574 at *2 . The fact that a party potentially may raise an issue in a writ proceeding does not compel the issuance of a writ. We must still consider the facts before us and determine if those facts justify the exercise of our discretionary power to issue a remedial writ.

In his reply brief, Hewitt suggests that he has no adequate remedy by way of an appeal once the arbitration proceeding is completed, thereby invoking one of the permitted categories for the issuance of a writ of prohibition. While courts have reviewed writ proceedings in matters involving arbitration, we reject Hewitt's suggestion that our courts routinely entertain writ proceedings challenging the validity or enforceability of an alleged arbitration agreement. Prohibition is a discretionary writ with no right to have it issued. State ex rel. Wyeth v Grady, 262 S.W. 3d 216, 219 (Mo. banc 2008). We further remind Hewitt that he has the burden of proving to this Court that his requested relief for the issuance of a writ of mandamus or writ of prohibition is appropriate. Furlong Cos. v. City of Kan. City, 189 S.W. 3d 157, 165-66 (Mo. banc 2006).

If Hewitt and the Rams engage in a neutral arbitration proceeding, we are not persuaded that Hewitt will be deprived of a remedy or adequate relief upon appeal should we decline to issue the requested writ. The Arbitration Provision, however, does not provide for a neutral arbitration proceeding. Instead, the Arbitration Provision entrusts the arbitration proceedings to the Commissioner, whose decision shall be final, binding, conclusive and unappealable. Here, the arbitrator is the designee of the Commissioner and the Commissioner owes his position to the teams comprising the NFL, which includes the Rams. Similar to the situation presented in State ex rel. Gayle Vincent v. Schneider, 194 S.W. 3d 853 (Mo. banc 2006), we find an arbitration provision that allows the selection of the arbitrator, who must be unbiased, to be made solely by an individual who is in a position of bias, to be unconscionable and unenforceable. An unconscionable arbitration provision in a contract will not be enforced. Id. at 856–61 (invalidating as unconscionable arbitration clauses allowing an entity related to one of the parties to select the arbitrator and requiring the consumer to pay for all arbitration fees); See also, Swain v. Auto Services, Inc., 128 S.W.3d 103, 105-109 (Mo. App. E.D. 2003) (invalidating as unconscionable an arbitration provision requiring a Missouri consumer to arbitrate in Arkansas).

The Rams’ suggestion that the NFL Constitution requires the employment of a commissioner who is “a person of unquestioned integrity” and who “shall have no financial interest, direct or indirect in any professional sport” does not negate the ingrained potential for bias associated with allowing a person who owes his employment and position to the NFL teams that selected him as Commissioner to preside over any dispute and select the arbitrator for proceedings in which an NFL team is a party. Our recognition of the potential for very real bias is not intended to impugn the integrity of the Commissioner or his appointee. However, the very nature of bias is often subtle and unseen to the person or persons holding such bias. For that reason, it is imperative that an arbitration proceeding be overseen by an arbitrator selected in an

objectively impartial and unbiased manner. The selection of the arbitrator under the Arbitration Provision does not afford a mechanism to ensure the fairness and impartiality of the arbitration proceeding. We hold that to force Hewitt to proceed with an arbitration given the method in which the arbitrator was selected would deprive Hewitt of an adequate remedy upon appeal. As noted in the Arbitration Provision, the Commissioner's decisions are final, binding, conclusive and unappealable. Hewitt should not be forced to overcome such an obstacle if he is not assured of an unbiased arbitrator.

We recognize the Missouri Supreme Court's recent holding in Brewer v. Missouri Title Loans, 364 S.W. 3d 486 (Mo. banc 2012), and in particular the discussion of focusing our analysis of unconscionability to matters impacting the formation of the contract. In that regard, we consider the following evidence. Hewitt was an equipment manager for a professional football franchise. The employment contract was presented to him without any discussion of its terms. The process of receiving, reviewing, and signing the contract lasted less than one minute. The contract was presented to Hewitt on a take-it or leave-it basis with the admonition that acceptance of the contract was and is a condition of continued employment. As noted in Brewer, oppression and unfair surprise can occur during the bargaining process or may become evident later, when a dispute or other circumstance invoke the objectively unreasonable terms. Brewer, 364 S.W. 3d at 493. "In either case, the unconscionability is linked inextricably with the process of contract formation because it is at the formation that the party is required to agree to objectively unreasonable terms". Id.

Whether stated in terms of procedural unconscionability in a pre-Brewer analysis or in the terms of analyzing matters impacting the formation of the contract, the record presented to this Court warrants a finding of unconscionability. The circumstances under which Hewitt entered into the employment agreement are clear. We can only surmise that these circumstances

substantially differ from the contract negotiations between the Rams and its players. To be sure, an agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not necessarily by its nature unconscionably unfair. Swain, 128 S.W. 3d at 108. But Hewitt's employment does not merely reflect a choice of arbitration over litigation. This agreement evidences an irrational and obligatory choice of a potentially biased arbitrator whose decision shall be final, binding, conclusive and unappealable over an impartial and appealable litigation process. Given these facts, we find the Arbitration Provision unconscionable and unenforceable.

Fortunately, as was noted by the Missouri Supreme Court in Vincent, Missouri statutes provide a remedy for this situation without undermining the freedom of parties to agree to arbitrate their disputes. This offending portion of the Arbitration Provision can be remedied by turning to Section 435.360, which provides:

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

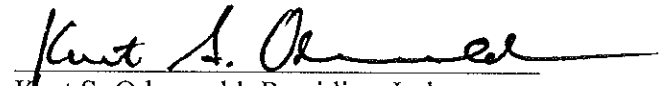
Vincent, 194 S.W.3d at 861.

We hold that the method of appointment of an arbitrator in the agreement between Hewitt and the Rams has failed. In that situation, Section 435.360 provides that the trial court shall appoint an arbitrator, which shall be vested with all of the powers originally granted by the Arbitration Provision.

Conclusion

The process of selection of an arbitrator in the contract is unconscionable. An arbitrator shall be selected by the trial court, pursuant to Section 435.360. The remainder of the Arbitration

Provision is enforceable. The Preliminary Order in Mandamus is quashed and the case shall proceed consistent with this opinion.


Kurt S. Odenwald, Presiding Judge
Writ Division One

Sherri B. Sullivan, J., Concur
Clifford H. Ahrens, J., Concur