

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ROUGH BROTHERS, INC.,	:	APPEAL NO. C-100373
	:	TRIAL NO. A-0605994
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
TIMOTHY BISCHEL,	:	
CHARLES HATFIELD,	:	
and	:	
SUPERIOR STRUCTURES, INC.,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 27, 2011

Ulmer & Berne L.L.P., Fredric X. Shadley, and James D. Houston, for Plaintiff-Appellee,

Thomas W. Condit, for Defendants-Appellants.

Please note: This case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendants-appellants Timothy Bischel, Charles Hatfield, and Superior Structures, Inc., (collectively “Appellants”) appeal the judgment of the trial court overruling their renewed motion to dismiss or, in the alternative, to vacate or modify an arbitration award. For the reasons that follow, we determine that Appellants’ arguments are without merit, and, therefore, we affirm the judgment of the trial court confirming the arbitration award.

Factual & Procedural Background

{¶2} Appellants Bischel and Hatfield were former employees of plaintiff-appellee Rough Brothers, Inc., an Ohio corporation located in Cincinnati, Ohio. Rough Brothers builds and maintains commercial greenhouses and garden centers. In 2000, Bischel and Hatfield allegedly downloaded over 3,000 separate computer files from Rough Brothers’ system without Rough Brothers’ permission. Bischel and Hatfield then left Rough Brothers’ employ and began a separate business, Superior Structures, Inc., in West Chester, Ohio, which competed with Rough Brothers, especially for work from Home Depot.

{¶3} The procedural history is extensive. In July 2000, Rough Brothers filed suit against Appellants in the Hamilton County Court of Common Pleas. The suit was then removed to the United States District Court for the Southern District of Ohio. In December 2000, the parties settled their district court litigation by entering into a detailed settlement agreement. In early January 2001, the district court entered an agreed order that dismissed all claims by the parties with prejudice. Notably, the district court’s dismissal order omitted language that the parties had included in their jointly proposed dismissal order to the court. The omitted language

provided that “[t]he Court shall retain jurisdiction over this matter and the parties to this matter for purposes of enforcing this Order and the Settlement Agreement and Mutual Release.”¹

{¶4} In July 2006, Rough Brothers, yet again, filed suit against Appellants in the Hamilton County Court of Common Pleas, seeking injunctive relief, specific performance, and a declaratory judgment after Appellants had allegedly failed to perform under the settlement agreement. Appellants moved to dismiss Rough Brothers’ complaint for lack of subject-matter jurisdiction or, in the alternative, to compel arbitration based upon the language in the settlement agreement. Specifically, Appellants relied on paragraph 15 of the settlement agreement, which provided, “The Parties agree that all disputes regarding this Agreement shall be resolved through the American Arbitration Association’s binding arbitration: provided, however, the Parties retain their right to seek injunctive relief or other equitable relief before the United States District Court for the Southern District of Ohio should any Party believe such Party is entitled to same.”²

{¶5} Further, paragraph 16 of the settlement agreement provided, “This Agreement shall be construed according to the laws of the State of Ohio. Any and all actions at law or in equity which may be brought by any of the Parties to enforce or interpret this Agreement shall be brought only in the United States District Court for the Southern District of Ohio, and no Party shall challenge jurisdiction or venue therein.”³

¹ T.d. 2, Exhibit A.

² Id.

³ Id.

{¶6} Appellants argued that because the settlement agreement allegedly provided for exclusive venue in the district court, Rough Brothers' case had to be dismissed in state court. Alternatively, Appellants argued that the case should be stayed pending arbitration of all claims.

{¶7} In May 2008, the trial court found it "necessary to take an alternative course of action."⁴ The trial court found that, pursuant to the settlement agreement, the parties intended that claims for equitable relief be brought in the federal district court. But instead of granting Appellants' motion to dismiss, the trial court decided to stay the case pending the outcome of Rough Brothers' petition to have the district court address Rough Brothers' complaint.

{¶8} Instead of petitioning the federal district court to accept jurisdiction, in June 2008, Rough Brothers filed a demand for arbitration with the American Arbitration Association. The parties then arbitrated their disputes with regard to the settlement agreement. In June 2009, the arbitrators rendered their final award and found largely in favor of Rough Brothers.

{¶9} In July 2009, Rough Brothers filed an application with the trial court to confirm the arbitration award. Appellants filed a renewed motion to dismiss, again claiming that the trial court did not have subject-matter jurisdiction because of the wording in the forum-selection clause in the settlement agreement. Appellants later filed a motion to vacate or modify the arbitration award based upon public-policy grounds, arguing that the settlement agreement was an unlawful restraint of trade. In May 2010, the trial court, without making specific findings of fact or

⁴ T.d. 30.

conclusions of law, adopted the arbitration award and entered judgment in favor of Rough Brothers for \$481,959.93 with interest and costs. This appeal ensued.

The Forum-Selection Clause in the Settlement Agreement

{¶10} In Appellants’ first assignment of error, Appellants argue that the trial court erred in overruling their renewed motion to dismiss and thereafter entering judgment against them. Appellants’ argument is premised on the forum-selection clause in the settlement agreement. We review the trial court’s decision denying the motion to dismiss de novo.⁵

{¶11} Appellants argue that the parties designated a specific venue in which to confirm an arbitration award, and that their designation should have been controlling. Appellants rely on paragraphs 15 and 16 of the settlement agreement. Paragraph 15 of the settlement agreement provides that the parties must arbitrate disputes regarding the settlement agreement. But it also provides that the parties retain the right to seek injunctive or other equitable relief in the United States District Court for the Southern District of Ohio. Paragraph 16 of the settlement agreement provides that any action at law or in equity that may be brought “to enforce or interpret” the agreement must be brought in the United States District Court for the Southern District of Ohio.

{¶12} “It is well established that, absent evidence of fraud or overreaching, a forum-selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause

⁵ *Ohio Assn. of Pub. School Emps./AFSCME Local 4, AFL-CIO v. Madison Local School Dist. Bd. of Edn.*, 190 Ohio App.3d 254, 2010-Ohio-4942, 941 N.E.2d 834, at ¶19.

would be unreasonable or unjust.”⁶ In *Kennecorp Mtge. Brokers v. Country Club Convalescent Hosp.*, the Ohio Supreme Court determined that “[f]orum selection clauses in the commercial contract context should be upheld, so long as enforcement does not deprive litigants of their day in court.”⁷

{¶13} Contrary to Appellants’ argument, the settlement agreement did not clearly designate a venue for confirming, modifying, or vacating an arbitration award. Therefore, we are not convinced that paragraphs 15 and 16 clearly apply to an action to confirm an arbitration award, which is how Rough Brothers chose to proceed in this case. Nevertheless, even if we were to construe paragraphs 15 and 16 to mean that an action to confirm an arbitration award is an action to “enforce or interpret” the settlement agreement, Appellants still cannot prevail if the chosen forum, the federal district court, lacked subject-matter jurisdiction to confirm the arbitration award. Thus, to enforce the forum-selection clause and determine that the trial court lacked jurisdiction to confirm the award would deprive Rough Brothers of its day in court.

Subject-Matter Jurisdiction in the District Court

{¶14} Assuming that Rough Brothers’ application to confirm the arbitration award fell within the ambit of the forum-selection clause in the parties’ settlement agreement, we must determine whether the forum selected, the United States District Court for the Southern District of Ohio, had subject-matter jurisdiction over Rough Brothers’ application.

⁶ *Information Leasing Corp. v. King*, 155 Ohio App.3d 201, 2003-Ohio-5672, 800 N.E.2d 73, at ¶15 (citing *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* [1993], 66 Ohio St.3d 173, 175, 610 N.E.2d 987).

⁷ *Kennecorp Mtge. Brokers, Inc.*, 66 Ohio St.3d at 176.

{¶15} “Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute * * *.”⁸ Although the district court exercised subject-matter jurisdiction over Rough Brothers’ original suit, that suit was dismissed after the parties had entered into the settlement agreement. Even if we assume that Rough Brothers’ application to confirm the arbitration award qualified as an action to enforce the settlement agreement under the parties’ forum-selection clause, Rough Brothers’ application stood independently from the dismissed suit under the United States Supreme Court’s decision in *Kokkonen v. Guardian Life Ins. Co. of Am.*⁹

{¶16} In *Kokkonen*, the Supreme Court determined that an action to enforce a settlement agreement, “[w]hether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.”¹⁰ The Supreme Court further determined that the federal court lacked ancillary jurisdiction to enforce a settlement agreement. The Court stated, however, that “[t]he situation would be quite different if the parties’ obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.”¹¹

⁸ *Kokkonen v. Guardian Life Ins. Co. of Am.* (1994), 511 U.S. 375, 377, 114 S.Ct. 1673.

⁹ *Id.*

¹⁰ *Id.* at 388.

¹¹ *Id.* at 397.

{¶17} Here, the district court specifically chose not to reserve jurisdiction in its entry dismissing the parties' claims with prejudice. Nor did the district court expressly incorporate the terms of the parties' settlement agreement into the dismissal entry. Without such a reservation or incorporation, "[e]nforcement of the settlement agreement [wa]s for state courts, unless there [wa]s some independent basis for federal jurisdiction."¹²

{¶18} But no independent basis for federal subject-matter jurisdiction existed in this case. In *Collins v. Blue Cross Blue Shield of Michigan*,¹³ the Sixth Circuit Court of Appeals determined that a state-court complaint seeking to confirm an arbitration award, which was a right that was provided in an agreement to arbitrate, was clearly a matter of state law. In *Collins*, a former employee filed a demand for arbitration of her claims against Blue Cross Blue Shield for violations of the federal Americans with Disabilities Act and comparable state laws after Blue Cross Blue Shield had terminated her employment.¹⁴ Finding violations of both federal and state law, the arbitrator awarded the employee back pay, attorney fees, and reinstatement.¹⁵ An agreement between the employee and Blue Cross Blue Shield provided for confirmation of the arbitration award in Michigan federal or state court.¹⁶

{¶19} The Sixth Circuit determined that, even though one of the employee's claims in the underlying arbitration was based upon federal law, the employee's action to confirm the award arose out of the agreement to arbitrate and thus was a

¹² Id. at 398.

¹³ (C.A.6, 1996), 103 F.3d 35, 38.

¹⁴ Id. at 35.

¹⁵ Id. at 36.

¹⁶ Id.

state-law matter.¹⁷ As the Sixth Circuit noted, the Federal Arbitration Act, Section 1 et seq., Title 9, U.S.Code could not serve as an independent basis for federal subject-matter jurisdiction.¹⁸ Thus, the Sixth Circuit held that the district court did not have subject-matter jurisdiction over the employee's action to confirm the arbitration award.¹⁹

{¶20} Furthermore, implicit in the holding of *Collins* is the proposition that “[s]ubject matter jurisdiction cannot be conferred on federal courts by consent of the parties.”²⁰ Thus, paragraphs 15 and 16 of the settlement agreement could not serve as an independent basis for federal subject-matter jurisdiction. Applying the case law that we have cited, we are convinced that the district court, even it was the chosen forum for an action to confirm the parties’ arbitration award, nevertheless lacked subject-matter jurisdiction.

**Enforcement of a Forum-Selection Clause Must Not Deprive
Litigants of Their Day in Court**

{¶21} Appellants argue that even if the district court lacked jurisdiction to confirm the award, we must nevertheless enforce paragraphs 15 and 16 of the settlement agreement. In other words, Appellants would have us dismiss this case pursuant to a contractual forum-selection clause, even though jurisdiction is not proper in another forum, and essentially render the parties’ arbitration award meaningless. We cannot accept Appellants’ argument.

¹⁷ Id. at 38.

¹⁸ Id. at 37-38 (citing *Detroit Pension Fund v. Prudential Securities, Inc.* [C.A.6, 1996], 91 F.3d 26).

¹⁹ Id. at 37.

²⁰ *Ford v. Hamilton Investments, Inc.* (C.A.6, 1994), 29 F.3d 255, 257.

{¶22} As we have already stated, forum-selection clauses will be enforced by Ohio courts in the commercial context, absent fraud or overreaching, and where enforcement will not operate in an unreasonable or unjust manner so as to deprive litigants of their day in court.²¹ Thus, a court could determine that a forum-selection clause was unenforceable if “the designated forum would be closed to the suit[.]”²²

{¶23} In this case, the district court lacked subject-matter jurisdiction over Rough Brothers’ action, and the parties’ designated forum was therefore effectively unavailable. Consequently, if we were to hold that the trial court erred in failing to dismiss Rough Brothers’ action and in not enforcing the forum-selection clause, Rough Brothers would have been deprived of any forum for its action. We refuse to enforce a forum-selection clause to reach such an unjust result.

{¶24} Therefore, Appellants’ first assignment of error is overruled.

Modifying an Arbitration Award on Public-Policy Grounds

{¶25} In Appellants’ second assignment of error, Appellants contend that the trial court erred in overruling their motion to modify the arbitration award on public-policy grounds. Appellants argue that the trial court should have reduced the arbitration award because the settlement agreement underlying the arbitration award constituted an unlawful restraint on competition. Appellants argue that, because of an “unintended effect” of the settlement agreement, it had become cost-prohibitive for Appellants to accept work for new Home Depot stores.²³ Notably, Appellants made their unlawful-restraint argument during arbitration, and the

²¹ *Kennecorp Mtge. Brokers*, 66 Ohio St.3d at 176.

²² *Security Watch, Inc. v. Sentinel Sys.* (C.A.6, 1999), 176 F.3d 369, 375 (citing Restatement of the Law 2d, Conflict of Laws [Rev.1988], Section 80, Comment c).

²³ Brief of Appellants at 7.

arbitrators specifically found that the settlement agreement was not an improper restraint of trade.

{¶26} “The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator’s award.”²⁴ “Thus, vacating an arbitration award pursuant to public policy is a narrow exception to the ‘hands off’ policy that courts employ in reviewing arbitration awards and ‘does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy.’ ”²⁵ Furthermore, to modify or vacate an award based upon public-policy grounds, the public policy “must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”²⁶

{¶27} Appellants argue that Ohio has a public policy against the enforcement of transactions that eliminate competition. In support of this argument, Appellants rely on *Raimonde v. Van Vlerah*²⁷ and its progeny, which construed the enforceability of restrictive covenants in employee/employer dealings. However, we find the noncompetition cases distinguishable from the present case. Here, the parties were business owners and entities, all represented by counsel, who voluntarily entered into an agreement to settle a lawsuit. Appellants are not prohibited from competing with Rough Brothers under the settlement agreement—

²⁴ *Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 83-84, 488 N.E.2d 872.

²⁵ *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 112, 2001-Ohio-294, 742 N.E.2d 630 (quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.* [1987], 484 U.S. 29, 43, 108 S.Ct. 364).

²⁶ *Southwest Ohio Regional Transit Auth.*, 91 Ohio St.3d at 112.

²⁷ (1975), 42 Ohio St.2d 21, 325 N.E.2d 544.

even in the construction of garden centers at new Home Depot stores—but Appellants must pay Rough Brothers for doing so.

{¶28} We cannot say that Ohio has a strong public policy against enforcement of settlement agreements that have the effect of deterring competition between the parties to such agreements because competition might be cost-prohibitive for one of the parties. Appellants have failed to show that Ohio has a well-defined and dominant public policy that could justify interfering with the decision of the arbitration panel. Therefore, we overrule Appellants’ second assignment of error and affirm the judgment of the trial court confirming the arbitration award.

Judgment affirmed.

DINKELACKER, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry this date.