J.A31040/13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAWN MCATEER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	No. 1428 EDA 2013

Appeal from the Order Entered April 10, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 1080 November Term, 2011

BEFORE: BENDER, P.J., LAZARUS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JANUARY 07, 2014**

Appellant, Dawn McAteer, appeals from the order in the Philadelphia County Court of Common Pleas that dismissed her petition to appoint a third arbitrator and compel arbitration.[1] Appellant contends the trial court erred in failing to constitute an arbitration panel and lacked jurisdiction to dismiss the petition. Concomitantly, counsel for Appellant, Elliott Tolan, Esq.,

* Former Justice specially assigned to the Superior Court.

[1] The denial of a petition to compel arbitration is immediately appealable. ***See*** 42 Pa.C.S. § 7320(a)(1); Pa.R.A.P. 311(a)(8); ***see also Cid v. Erie Ins. Group***, 63 A.3d 787 (Pa. Super.) (considering appeal from trial court order dismissing petition seeking appointment of neutral arbitrator based on improper venue without prejudice to relief in another county), *appeal denied*, 77 A.3d 1258 (Pa. 2013).

appeals from the order imposing a $300 sanction against him.[2] He asserts that the record did not support the court's determination that his filings were frivolous and deceptive. We affirm the dismissal of Appellant's petition to compel arbitration and vacate the sanction imposed by the court.

This appeal relates to a motor vehicle accident that occurred in July 2001.[3] More than ten years later, on November 15, 2011, Appellant, represented by Richard M. Gillis, Esq., filed a petition to appoint a third/neutral arbitrator and to order arbitration naming Appellee, State Farm Mutual Automobile Insurance Company, as defendant. Appellant averred, *inter alia*, that: (1) she was a resident of Bucks County; (2) her insurance policy with Appellee required arbitration of her uninsured motorist claim; and (3) she was not able to locate a copy of her policy.[4] Appellant's Pet. to Appoint Third/Neutral Arbitrator and to Order Arbitration, 11/15/11, ¶¶ 1, 13, 21. On January 12, 2012, the trial court dismissed Appellant's petition "without prejudice to refile with a copy of the document that supports the claim for arbitration." Order, 1/12/12.

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[2] "An order imposing sanctions, including one that imposes sanctions on an attorney, is considered a final order and is therefore appealable." Stewart v. Foxworth, 65 A.3d 468 (Pa. Super. 2013) (citation omitted).

[3] The first document in the certified record is Appellant's November 15, 2011 petition to appoint a third/neutral arbitrator and to order arbitration.

[4] On December 2, 2011, Attorney Gillis filed a separate motion to compel arbitration that was identical to his prior petition.

Nearly one year later, on January 4, 2013, Appellant's present counsel, Attorney Tolan, entered his appearance, and on January 15th, filed a motion for reconsideration of the January 12, 2012 order. The motion for reconsideration was substantially similar to Attorney Gillis' petition to compel arbitration, but averred that Appellant was a resident of Philadelphia County and that the parties "preliminarily went forward with the uninsured motorist claim for a while." Appellant's Mot. for Reconsideration, 1/15/13, ¶¶ 1, 3. Apparently referring to Attorney Gillis' petition, Appellant argued that "the petition should have been granted as unopposed." ***Id.*** at ¶ 11. Moreover, she asserted her claim "switched . . . to a UIM claim" and that she was entitled to have an arbitration panel convened by the trial court. ***Id.*** at ¶¶ 12-13.

On January 30, 2013, Appellee filed a response to the motion for reconsideration. Appellee averred that Appellant, while represented by then-Attorney Allen L. Feingold in 2004, filed a similar petition to appoint an arbitrator and compel arbitration. Appellee's Answer to Appellant's Pet. for Recons., 1/30/13, ¶ 6. The trial court, with the Honorable William J. Manfredi presiding, had denied the petition and transferred the matter to Bucks County on July 19, 2004. ***Id.*** Appellee also asserted that it filed a petition to compel arbitration in Bucks County on February 6, 2012—one month after the dismissal without prejudice of Attorney Gillis' petition to compel arbitration and eleven months prior to the filing of Attorney Tolan's

motion for reconsideration. ***Id.***, New Matter, ¶ 1. Additionally, Appellee attached a proposed order seeking sanctions that stated, "[Appellant's] attorney will pay to [Appellee's] attorney the sum of $300.00 as sanction for filing a frivolous motion." ***Id.***, Proposed Order.

The trial court, on the same day Appellee filed its response, authored an order granting Appellant's motion for reconsideration "but only until [Appellant] submits a copy of the insurance policy provisions that are the basis for her motion to compel arbitration[.]" Order, 1/31/13. The court also granted Appellant sixty days "for discovery of the relevant insurance policy." ***Id.*** The order was filed and docketed on January 31, 2013.

Appellee, on February 11, 2013, filed a motion for reconsideration, suggesting that the trial court did not have the benefit of its response when it authored its January 31, 2013 order. The court, on February 20, 2013, entered an order directing Appellant to respond to Appellee's assertions that Judge Manfredi previously determined that the proper venue for her petition to compel arbitration was in Bucks County. Order, 2/20/13.

Appellant filed an answer in which Attorney Tolan represented that he was unaware of the 2004 proceedings on Attorney Feingold's petition and that the Disciplinary Board had seized Appellant's case file. Appellant's Answer to Appellee's Mot. for Recons., 3/21/13, ¶ 13. Nevertheless, Attorney Tolan asserted that Judge Manfredi mistakenly transferred Attorney Feingold's petition in 2004 "because of baseless statements by [Appellee's]

counsel" and, although Attorney Feingold intended to file a motion of reconsideration, he was suspended from practice and later disbarred. ***Id.*** at ¶¶ 8, 11-12. He further asserted that Appellee perpetrated fraud on the court when it averred that Appellant was a resident of Bucks County but attempted to serve her in Philadelphia. ***Id.*** at ¶¶ 24-29. Attorney Tolan further maintained that: (1) Appellant was a resident of Philadelphia at all times she filed her petitions to compel arbitration; (2) the policy between her and Appellee permitted arbitration in the county of her residence at the time she filed a petition; and (3) her prior and current petitions were properly before the trial court. ***Id.*** at ¶¶ 9-10, 24, 31. He also attached to his answer three pages from a 2004 deposition of Appellant indicating that her residence at that time was in Philadelphia and two pages of a "specimen" policy indicating that arbitration "shall take place in the county in which the ***insured*** resides[.]" ***Id.***, Ex. 4-5. However, Appellant's answer also contained a copy of the declarations page of her policy in effect from June to December of 2001 indicating that her address was in Bucks County. ***Id.***, Ex. 1.

On April 10, 2013, the trial court entered an order dismissing Appellant's petition to appoint a third arbitrator and compel arbitration. In that same order, the court indicated that it granted Appellee's request for $300 in sanctions against Attorney Tolan. Although Appellant filed a motion for reconsideration, she then filed a timely notice of appeal on May 8, 2013.

The trial court denied the motion for reconsideration the following day and did not order the filing of a Pa.R.A.P. 1925(b) statement.

Appellant's brief poses two questions:

> Whether the trial court erred in dismissing [A]ppellant's petition to appoint a third arbitrator and to compel arbitration?
>
> Whether the trial court erred in imposing monetary sanctions against [A]ppellant's counsel?

Appellant's Brief at 3.

Appellant first claims that the trial court erred in dismissing her petition to compel arbitration in Philadelphia. In support, she notes the principle that it is within the authority of the arbitrators to determine whether Appellant was legally entitled to recover damages. ***Id.*** at 8-9. From this, she extrapolates that the trial court was compelled to grant the petition to compel arbitration she filed in 2011, and that the remaining issues regarding the scope of the policies were for the arbitrators to determine. ***Id.*** In sum, she asserts "the trial court was without jurisdiction to dismiss the present action." ***Id.*** at 9. No relief is due.

Our standard of review is as follows:

> We review a trial court's denial of a motion to compel arbitration for an abuse of discretion and to determine whether the trial court's findings are supported by substantial evidence. In doing so, we employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement.

Smay v. E.R. Stuebner, Inc., 864 A.2d 1266, 1270 (Pa. Super. 2004) (citations omitted).

Instantly, while Appellant refers to general principles of law regarding jurisdiction, she fails to address the dispositive issue of venue. ***See generally Shapiro v. Keystone Ins. Co.***, 558 A.2d 891, 893 (Pa. Super. 1989) (noting "when an arbitration clause calls for arbitration in one particular county, parties to the contract are limited to that single forum"). Appellant develops no argument related to the trial court's determinations that it was bound by the 2004 ruling transferring venue to Bucks County and that she failed to assert a specific contractual basis that permitted venue in any county in which she resided at the time of filing her petition. Accordingly, we have no basis on which to grant relief. ***See*** Pa.R.A.P. 302(a), 2119(a); ***Creazzo v. Medtronic, Inc.***, 903 A.2d 24, 28 (Pa. Super. 2006).

Attorney Tolan next claims that the trial court erred in imposing sanctions against him. Attorney Tolan suggests that the record did not support the conclusion that his filings were frivolous or deceptive. Appellant's Brief at 11. He argues that he was unaware of the prior proceedings related to the claims raised in his motions and responses. ***Id.*** Moreover, he maintains that the trial court lacked jurisdiction to dismiss his petition and thus asserts that the imposition of sanctions was inappropriate.

Id. Following our review, we are compelled to vacate the imposition of sanctions.

We review the imposition of sanctions for an abuse of discretion. ***Stewart***, 65 A.3d at 471. "An abuse of discretion requires more than a difference of opinion as to the conclusion reached; rather, discretion is abused 'if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record.'" ***Krafft v. Downey***, 68 A.3d 329, 332-33 (Pa. Super. 2013).

Instantly, Appellee, when seeking sanctions, attached to its January 30, 2013 response a proposed order seeking payment of $300 to Appellee's attorney. Although the proposed order suggested sanctions based on Attorney Tolan's filing of a frivolous motion, Appellee did not cite legal authority for the sanctions, nor did it support its proposed order with averments or an *ad damnum* clause in a separate motion or its response. The trial court, when imposing the $300 sanction, did not cite authority for its order. However, it opined that Appellant's "petitions to appoint a neutral arbitrator and to compel as well as her motions for reconsideration . . . [were] frivolous, oppressive and deceptive in nature." Trial Ct. Op., 4/10/13, at 4.

Given the absence of the authority relied upon by Appellee or the trial court, a review of the record for the basis on which the court imposed its

sanction is impossible. Moreover, we note that the imposition of sanctions generally requires a hearing, a reasonable opportunity to respond, or an opportunity to correct the offending conduct. ***See*** 42 Pa.C.S. §§ 2503 (discussing rights of participants to reasonable counsel fee),[5] 4132 (discussing contempt);[6] Pa.R.C.P. 1023.1-.4 (discussing violations of signing of documents and representations to court requirements).[7] Lastly, we note that the trial court did not expressly consider issues of fact raised in Attorney Tolan's motions and responses, including his averment that he was not and could not have been aware of the 2004 proceeding or Judge Manfredi's order. Thus, we agree with Attorney Tolan that the absence of a properly developed record requires that the $300 sanction be vacated.

Order affirmed in part and vacated in part. Jurisdiction relinquished.

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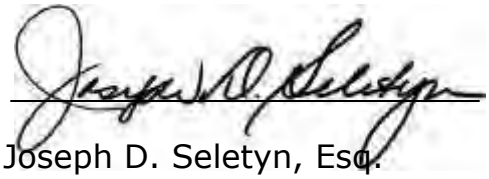
[5] ***See also In re Estate of Burger***, 852 A.2d 385, 392 (Pa. Super. 2004) (noting that disposition of claims under subsection 2503(7) or (9), related to vexatious or arbitrary conduct, generally requires evidentiary hearing unless facts are undisputed).

[6] ***See also Wood v. Geisenhemer-Shaulis***, 827 A.2d 1204, 1207-08 (Pa. Super. 2003) (discussing civil contempt and noting, "We have found a clear abuse of discretion when the trial court makes a 'determination based on a record where no testimony was taken and no evidence entered . . .").

[7] ***See also*** Pa.R.C.P. 1023.2(a) (requiring party seeking sanction to make separate application describing violation of Rule 1023.1(c)), 1023.2(b) (requiring that requesting party serve written notice and demand and permitting a twenty-eight day period for target party to correct its filing), 1023.3 (requiring court seeking to impose sanction on its own initiative to issue rule to show cause why target party has not violated Rule 1023.1(c)).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/7/2014