NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

TIMOTHY R. CALFO, AN ADULT INDIVIDUAL	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DONNA L. JONES A/K/A DONNA L. CALFO, A/K/A DONNA L. COLEMAN, AN ADULT INDIVIDUAL	:	
Appellant	:	No. 104 WDA 2023

Appeal from the Order Entered January 13, 2023
In the Court of Common Pleas of Allegheny County Civil Division at
No(s): GD-22-011544

BEFORE: BOWES, J., KUNSELMAN, J., and MURRAY, J.

MEMORANDUM BY KUNSELMAN, J.: **FILED: January 19, 2024**

In this interlocutory appeal as of right,[1] the Defendant, Donna L. Jones, challenges the order overruling her preliminary objection, which sought to compel Plaintiff, Timothey R. Calfo, to arbitrate this case. Because Ms. Jones created no evidentiary record for us to review, we affirm.

Without a factual record, at this early stage in the proceedings, we can only summarize the facts to which the parties agree in their appellate briefs. The parties agree they are mother and son, and they lived together in a

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[1] "An appeal may be taken as of right . . . from [an] order that is made [immediately] appealable by statute . . . even though the order does not dispose of all claims and of all parties." Pa.R.A.P. 311(a)(8). By statute, "An "appeal may be taken from[a] court order denying an application to compel arbitration . . . ." 42 Pa.C.S.A. § 7320(a)(1).

Pittsburgh residence for a number of years. ***See*** Jones' Brief at 8;[2] ***see*** Calfo's Brief at 4. They also agree that Mr. Calfo renovated the residence and that he later moved out. ***See id.*** at 8 and at 5, respectively. Finally, the parties agree they "have a business relationship" involving a company named Calfo Properties, LLC. Jones' Brief at 8; ***see also*** Calfo's Brief at 4 (accord). However, they disagree over the nature and extent of that relationship.

The parties dispute whether Mr. Calfo owns 50% of the company.[3] They also dispute whether Ms. Jones agreed to sell her interest in the company to Mr. Calfo, whether she agreed to sell him the residence, whether she owes him money for renovations to the residence and the company's property, and whether Ms. Jones improperly removed money from the company's account.

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[2] We note that Ms. Jones's Reproduced Record violated the Rules of Appellate Procedure. She stapled a 305-page Reproduced Record at random intervals into 14 booklets and duct tapped those booklets together. On a first reading, the middle booklets began spilling from their "binding." By the fourth reading, the Reproduced Record collapsed onto the floor. We remind appellate counsel that the purpose of a reproduced record is to simplify appellate review by placing all pertinent documents in a bound volume(s). This alleviates our need to sort through individual documents in the certified record. Thus, the Supreme Court of Pennsylvania has mandated that "reproduced records . . . shall be ***firmly*** bound at the left margin." Pa.R.A.P. 2171 (emphasis added). Duct tape does not firmly bind a Reproduced Record of this size, which requires a more secure binding.

[3] Mr. Calfo alleges that he and Ms. Jones "owned and operated Calfo Properties as 50/50 members." Complaint at 3. Ms. Jones took no position as to what percentage of the company she owns in her pleading. ***See*** Preliminary Obejctions at 2-3. Thus, at this juncture, she has made no claim of owning any part of the company.

Due to these disagreements, on September 15, 2022, Mr. Calfo sued Ms. Jones for seven claims: (1) declaratory judgment (to determine their ownership percentages in the company), (2) injunction, (3) breach of contract (a sales agreement), (4) unjust enrichment (improvements to the company's property), (5) unjust enrichment (improvements to the residence), (6) fraud, and (7) conversion. ***See*** Complaint at 13-23. Pertinent to this appeal, Mr. Calfo attached two operating agreements ("OAs") for the LLC to his Complaint. ***See id.*** at Ex. D and Ex. F.

Regarding the first OA, Mr. Calfo alleged as follows:

> On or about January 12, 2017, counsel for Calfo Properties drafted an Operating Agreement for the company listing [Mr. Calfo] and [Ms. Jones] as each holding 50% of the membership interests of the company (the "Calfo-Jones OA"), with the intention that the right to purchase [a certain] commercial property would be assigned to Calfo Properties, which would then go on to own, manage, and lease the [commercial] property.

Id. at 7. However, neither party signed that OA. ***See*** Complaint at Ex. D. Also, Mr. Calfo did ***not*** allege that the Calfo-Jones OA is operable or binding upon the parties. ***See*** Complaint at 7.

As for the second OA, Mr. Calfo alleged that Ms. Jones produced it five years after they formed the company and that she used it to assert "for the first time in the spring of 2022, that she was the sole owner of Calfo Properties." ***Id.*** at 6. According to Mr. Calfo, Ms. Jones claimed sole ownership based on a "certain transaction that occurred early in the company's existence and that, by her own assertion, she was not aware of until spring 2022." ***Id.***

at 8. "Specifically, on or about January 12, 2017, the same day the Calfo-Jones OA was prepared, the company's attorney purportedly prepared another operating agreement listing [Ms. Jones] as the sole member of Calfo Properties (the "Jones OA")," which Ms. Jones signed. ***Id.***

Thus, Mr. Calfo's Complaint made no assertion regarding the Jones OA, other than what Ms. Jones said to him and third parties about that document. In other words, as with the Calfo-Jones OA, Mr. Calfo made no allegation that the Jones OA is operable or binding upon the parties.

Instead, he alleged she used the Jones OA for fraudulent ends. Mr. Calfo claimed that he had "no knowledge of the Jones OA or [an] Assignment of Agreement of Sale" regarding the commercial property. ***Id.*** at 8. According to Mr. Calfo, Ms. Jones "forged [his] signature on the Assignment of Agreement of Sale to falsely reflect that he assented to the assignment of his right to purchase the commercial property to an entity in which [Ms.] Jones was the sole member." ***Id.*** at 8-9. Clearly, Mr. Calfo did ***not*** allege that the Jones OA was a valid and operable agreement.

Upon receiving the Complaint, Ms. Jones filed Preliminary Objections Raising Questions of Fact, including a preliminary objection in the nature of a petition to compel arbitration.[4] Therein, she never pleaded that either OA was operable or binding upon the parties. Rather than making a factual assertion regarding the Jones OA's operability, Ms. Jones' pleading merely announced

[4] Her other preliminary objections are not relevant to this appeal.

her interpretation of one section of the OA. She stated the Jones OA "provides that any dispute that arises under the Agreement shall be resolved by arbitration . . . ***See*** Exhibit F of the Complaint." Preliminary Objections at 3. Hence, she failed to aver that the parties agreed to be bound by the Jones OA, much less by the arbitration provision therein.

Next, she pleaded, "Should the court find that the [Calfo-Jones OA] is controlling, the same above referenced agreement to arbitrate is part of the Agreement. ***See*** Exhibit D of the Complaint, Article V, para. 5.5." ***Id.*** As in her prior statement, Ms. Jones again neglected to assert that the parties agreed to be bound by the Calfo-Jones OA. She then offered two conclusions of law on the breadth of the arbitration clauses and her desired result (*i.e.*, dismissal of the Complaint). ***See id.***

Mr. Calfo replied, "The [above] averments . . . refer to writings which speak for themselves, and any attempt to summarize or characterize same is rejected." Response to Preliminary Objections at 6. Further, the preliminary objection "failed to explain how [the Jones OA] to which [Mr. Calfo] is not a party . . . would have any applicability to [him]." ***Id.*** at 5. He also noted that Ms. Jones "seeks to enforce the arbitration provisions of the Calfo-Jones OA while simultaneously failing to concede that [the Calfo-Jones OA] is 'controlling' and also recognizing that the court must [decide] the applicable operating agreement/membership structure before it can even consider the arbitration provision." ***Id.*** at 5-6. Thus, Mr. Calfo highlighted multiple factual

issues and omissions within Ms. Jones' preliminary objection in the nature of a petition to compel arbitration.

Instead of meeting Mr. Calfo's factual challenges with evidence to establish that one of the OAs binds the parties, Ms. Jones rested on the pleadings and her brief in support of the preliminary objections. The trial court heard oral argument[5] and subsequently overruled the preliminary objections. This timely appeal followed.

Ms. Jones raises one appellate issue:

> Whether the [trial court] abused its discretion and/or erred as a matter of law and/or its decision was unsupported by substantial evidence in overruling [Ms. Jones'] preliminary objection asserting the existence of an agreement to arbitrate under Pa.R.C.P. 1028(a)(6) to [Mr. Calfo's] Complaint, when there exists a valid arbitration agreement between the parties and the present disputes are within the scope of the agreement.

Jones' Brief at 5.

Ms. Jones contends "[t]here is no dispute that there is a valid agreement to arbitrate enforceable against [Mr. Calfo]." ***Id.*** at 13. She bases that conclusion solely upon Mr. Calfo's allegation that he is a 50% member of the company. ***See id.*** at 15. She believes that his averment of membership, if accepted as true, "supports that [Mr. Calfo] became a member sometime after January 12, 2017." ***Id.*** Ms. Jones therefore asserts that, under 15 Pa.C.S.A.

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[5] Curiously, Ms. Jones declined to request that a transcript of oral argument be included in the certified record. ***See*** Notice of Appeal at 1.

§ 8816(b),[6] "the Operating Agreement is enforceable against [Mr. Calfo]." ***Id.*** In her mind, the existence of an arbitration agreement is apparent on the face of the pleadings and, thus, beyond dispute.

We disagree. Not only is there a dispute over whether the parties entered into a valid agreement to arbitrate, that is the very dispute Ms. Jones asks us to resolve on appeal. ***See id.*** at 5. Indeed, the trial court found that an agreement to arbitrate does ***not*** exist, because neither of the OAs attached to the Complaint bear Mr. Calfo's signature. ***See*** Trial Court Opinion, 3/17/23, at 5. Thus, the trial court reviewed the pleadings and came to the exact opposite conclusion of Ms. Jones. It found the ***nonexistence*** of an agreement to arbitrate so clear that "no further discovery was necessary." ***Id.***

"Our review of a claim that the trial court improperly denied preliminary objections in the nature of a petition to compel arbitration is limited to determining whether the trial court's findings are supported by substantial ***evidence*** and whether the trial court abused its discretion in denying the petition." ***Davis v. Ctr. Mgmt. Grp., LLC***, 192 A.3d 173, 180 (Pa. Super. 2018) (emphasis added) (some punctuation omitted).

In ***Davis***, this Court vacated an order overruling a preliminary objection in the nature of a petition to compel arbitration, because the trial court abused its discretion by failing to develop an evidentiary record for us to review. We

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[6] 15 Pa.C.S.A. § 8816(b) provides, "A person that becomes a member of a limited liability company is deemed to assent to the operating agreement."

remanded with instructions for the trial court to hold a hearing and thereafter to rule upon the merits of the preliminary objection.

Here, the trial court arguably committed the same abuse of discretion, but Ms. Jones did not raise that procedural issue in the trial court or on appeal. She emphasizes that she "did not request limited discovery as part of her preliminary objection, as it was not necessary [because Mr. Calfo] pled not one but two arbitration agreements." Jones' Brief at 15-16. Thus, she has waived any claim that the trial court abused its discretion by failing to conduct discovery prior to ruling on the preliminary objections. ***See*** Pa.R.A.P. 302(a).

The decision to forgo discovery reveals Ms. Jones' misunderstanding of the scope of review for a preliminary objection in the nature of a petition to compel arbitration. Her acceptance of the facts alleged in Mr. Calfo's pleading as true was an error. As explained below, the allegations in the Complaint are outside our (and the trial court's) scope of review for preliminary objections filed under Pa.R.C.P. 1028(a)(6).

There are many types of preliminary objections. ***See*** Pa.R.C.P. 1028(a). They include preliminary objections in both the nature of a petition to compel arbitration and the nature of a demurrer. ***See id.*** Ms. Jones seems to have confused the scope of review for the former with the scope of review for the latter. "Preliminary objections ***in the nature of a demurrer*** require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." ***412 N. Front St. Assocs., LP v.***

Spector Gadon & Rosen, P.C., 151 A.3d 646, 656 (Pa. Super. 2016) (emphasis added). "All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true." ***Id.***

In contrast to the demurrer, "preliminary objections in the nature of a petition to compel arbitration filed pursuant to Pa.R.C.P. 1028(a)(6) ***cannot*** be determined from facts of record." ***Davis***, 192 A.3d 183 (emphasis added); ***see also*** Pa.R.C.P. 1028, *Note*. "In other words, a dispute raising an issue under Rule 1028(a)(1), (5), (6), (7) or (8) cannot be resolved by reference to facts pled in the complaint. Additional evidence is required." ***Id.*** (quoting ***Trexler v. McDonald's Corp.***, 118 A.3d 408, 412 (Pa. Super. 2015) (some punctuation omitted). The complaint is not competent evidence for purposes of a preliminary objection brought under Pa.R.C.P. 1028(a)(6).

Rule 1028(a)(6) placed the burdens of production and persuasion upon Ms. Jones to offer competent evidence – by affidavits, requests for admissions, depositions, or a hearing – to convince the trial court that an agreement to arbitrate existed. She never attempted to meet these burdens. In fact, Mc. Jones never took any official position as to which of the OAs is operable, much less proved it. Ms. Jones' failure to offer any proof is fatal to her preliminary objection, because it is entirely possible that ***neither*** of the OAs is operable.

Looking solely at the unsigned Calfo-Jones OA, at best, the parties neglected to execute that writing and potentially failed to form an LLC in the first place. Hence, they may be partners under the common law, or they may have no business relationship whatsoever. At worst, the OAs may be drafts

or fakes, manufactured in anticipation of this litigation. On this paltry record of only a Complaint and preliminary objections, it is impossible for any court to make such determinations.

In sum, Ms. Jones' reliance upon the unproven allegations in Mr. Calfo's Complaint is misplaced and unavailing.[7] ***See Trexler***, ***supra***. The Rules of Civil Procedure and our precedents required her to prove, through competent evidence, that "a valid agreement to arbitrate exists, and . . . the dispute is within the scope of the agreement." ***Washburn v. Northern Health Facilities, Inc.***, 121 A.3d 1008, 1012 (Pa. Super. 2015). Due to Ms. Jones's confusion over the scope of review for this preliminary objection, she produced no evidence to establish that a valid agreement to arbitrate exists. Thus, there is no competent evidence within our scope of review. ***See Davis***, ***supra***. Having nothing of record to review, we may not disturb the trial court's order overruling the preliminary objection.

Order affirmed. Case remanded for Ms. Jones to file her Answer to the Complaint.

Jurisdiction relinquished.

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[7] Additionally, even if we accepted the facts pleaded in Mr. Calfo's Complaint as true, this Court still would lack grounds to enforce either OA, because Mr. Calfo never signed either of the OAs attached to his Complaint. Furthermore, Mr. Calfo never alleged that either of the OAs was operable. Hence, in order to enforce the arbitration clause, we would have to make a separate finding of fact – wholly apart from Mr. Calfo's pleaded facts – that the parties intended one of the OAs to bind them. This we could not do even under our scope of review for a demurrer. ***See 412 N. Front St. Assocs., LP v. Spector Gadon & Rosen, P.C.***, 151 A.3d 646, 656 (Pa. Super. 2016).

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 01/19/2024