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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-722

ERWIN-KEITH, INC. APPELLANT	**Opinion Delivered:** February 21, 2018 APPEAL FROM THE MONROE COUNTY CIRCUIT COURT [NO. 48CV-16-101]
V.	HONORABLE E. DION WILSON, JUDGE
HENRY LEE STEWART, JR., D/B/A STEWART FARMS APPELLEE	AFFIRMED

KENNETH S. HIXSON, Judge

Erwin-Keith, Inc. (Erwin-Keith or appellant), appeals after the Monroe County Circuit Court denied its motion to compel arbitration in favor of appellee Henry Lee Stewart, Jr., d/b/a Stewart Farms (Stewart Farms or appellee). On appeal, appellant argues that the circuit court's finding that no arbitration agreement existed between the parties based on the evidentiary record was clearly erroneous. We affirm.

I. *Facts*

Stewart Farms grew and harvested rice annually. During the 2015 crop year, Stewart Farms entered into a series of four grain purchase agreements (hereinafter referred to as the "contracts") with Erwin-Keith, wherein Erwin-Keith agreed to purchase the rice. After harvesting the 2015 crop, Stewart Farms attempted to deliver the rice to Erwin-Keith; however, Erwin-Keith refused to accept delivery. On October 3, 2016, Stewart Farms filed

its complaint for breach of contract against Erwin-Keith alleging damages in excess of $500,000. The complaint did not attach copies of the contracts.

Erwin-Keith filed a motion to dismiss the complaint or, in the alternative, to order arbitration. Even though Stewart Farms did not attach the 2015 contracts to its complaint, Erwin-Keith attached copies of the alleged 2015 contracts in dispute as exhibits 1 through 4 to its motion. The originals of the four 2015 contracts were not attached. Instead, Erwin-Keith attached copies of the alleged contracts as exhibits. Each attached exhibit consisted of two pages. Page one was the front of the contract, which contained the identity of the parties, the quantity, grade, price, shipment period for the rice, and signatures of the parties. Page two of the exhibits contained information described as the "Terms and Conditions." Erwin-Keith requested that the circuit court dismiss the action pursuant to the "Terms and Conditions" set forth in page two of those contracts. Alternatively, it argued that the circuit court should dismiss the complaint and order Stewart Farms to submit the dispute to arbitration before the National Grain and Feed Association, also pursuant to the "Terms and Conditions." Furthermore, in its brief in support, Erwin-Keith stated that Stewart Farms did not have copies of the contracts to attach to its complaint. Therefore, Erwin-Keith stated that "the contracts [it attached to its motion to dismiss] should be considered a part of Stewart Farm's Complaint for all purposes."

The four exhibits appear to be four nearly identical form contracts. Page one states that it is a grain purchase contract between Stewart Farms and Erwin-Keith and contains signatures on behalf of both parties. The last paragraph on page one states:

> This contract was made and accepted by the Seller and Erwin-Keith, Inc. in the State of Arkansas and is governed by the laws of the State of Arkansas. Failure to notify Erwin-Keith, Inc. of any discrepancies in the body of this contract within 15 days of receipt will constitute acceptance. For additional information concerning the terms and conditions of the Buyer see the reverse side of this document.

Page two for each alleged contract contains no signatures or initials by the parties but is entitled "TERMS AND CONDITIONS." Included in paragraph 2 of the terms and conditions is the following pertinent language:

> To the extent not inconsistent with the terms of this confirmation, this transaction is subject in all respects to the rules and regulations of the exchange, board, or association designated herein. If Seller is not a member of said exchange, then the rules of the NGFA shall apply. Buyer and Seller agree that all disputes and controversies between them with respect to this contract shall be arbitrated according to said rules and regulations.

The allegations and responses thereto in the pleadings of the parties are of particular importance to this case. In Erwin-Keith's motion to dismiss, it alleged, "2. The contracts at issue are attached as Exhibits 1 through 4. Each of the contracts have identical Terms and Conditions." Stewart Farms filed a response generally denying the motion to dismiss or, in the alternative, to order arbitration. Further, specifically in paragraph two of Stewart Farms's response, Stewart Farms states, "Paragraph Two (2) does not require a response, in the event a response is required, Plaintiff denies same."

After Stewart Farms had filed its response, Erwin-Keith filed a reply, stating inter alia:

> The plaintiff has not provided a substantive response to Erwin-Keith's motion. For example, in Paragraph 2 of its motion, Erwin-Keith states that "the contracts at issue are attached hereto as Exhibits 1 through 4. Each of these contracts have identical Terms and Conditions." In response to his allegation, the Plaintiff responded by

> stating: "Paragraph Two (2) does not require [*sic*] a response; in the event a response is required, Plaintiff denies same." This response is a non-sequitur.

In response to Erwin-Keith's reply, Stewart Farms filed a supplemental response in which it again repeated its response to paragraph two by stating, "Paragraph Two (2) [of Erwin-Keith's motion] does not require a response, in the event a response is required, Plaintiff denies same." In its brief in support of its supplemental response, Stewart Farms additionally contended that the terms and conditions on page two were unenforceable for a variety of reasons. Erwin-Keith filed another response in opposition, arguing that the arbitration clause was enforceable because "arbitration is strongly favored as matter of public policy and any doubts and ambiguities with respect to coverage should be resolved in favor of arbitration."

Subsequently, Stewart Farms filed an amended complaint on January 9, 2017. It added an additional count for breach of contract and for fraud. Stewart Farms alleged that Erwin-Keith accepted delivery of 98,270 bushels of rice but failed to pay for the rice. Therefore, Stewart Farms sought damages for all claims in excess of $1,621,455. The amended complaint again did not attach any written contracts.

Erwin-Keith filed an answer and attached copies of the same four alleged contracts that were attached to its previous motion to dismiss the complaint or, in the alternative, to order arbitration. It further represented in the answer that "Erwin-Keith states that the contracts it believes are at issue are attached hereto as Exhibits 1 through 4." Additionally, Erwin-Keith alleged several affirmative defenses, including that the contracts at issue contain an arbitration clause.

Subsequently, Erwin-Keith filed a motion to compel arbitration and to stay proceedings. In this motion, Erwin-Keith alleged that paragraph 2 of the terms and conditions required that all disputes and controversies be arbitrated. Stewart Farms filed a response, generally denying the allegations. In response to Erwin-Keith's paragraph alleging that the contracts at issue were the ones that it previously provided, Stewart Farms responded, "Plaintiff is without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph Four (4) of Defendant's Motion, therefore Plaintiff denies same."

A hearing was held on the motion to compel arbitration on April 17, 2017. No testimony was presented, and counsel for the parties orally argued their respective positions. Erwin-Keith essentially argued that the plain language of the contracts required the disputes to be arbitrated. Stewart Farms argued that the "alleged arbitration agreement is unconscionable on its face." It further argued that although the first page of the contracts references terms and conditions on the reverse side of the document, "there is no place for a signature acknowledging those specific terms and conditions." Stewart Farms additionally argued that although Erwin-Keith relies on paragraph 2 to compel arbitration, no exchange board or association was designated; "NGFA" is not defined; and if the circuit court was to agree with Erwin-Keith that the arbitrator is the National Grain and Feed Association, the NGFA rules require a minimum of 1.5 percent of the claim amount or a maximum of $20,000 to even participate in arbitration. Therefore, Stewart Farms contended that it was "an unconscionable arbitration agreement if it even applies."

The circuit further asked the following questions of Stewart Farms:

THE COURT: If you go to paragraph – the first page of the contract?

[STEWART FARMS]: Yes, sir.

THE COURT: It states, "This contract was made and accepted by the seller and Erwin-Keith, Inc. in the State of Arkansas and is governed by the laws of the State of Arkansas. Failure to notify Erwin-Keith of any discrepancies in body of this contract within 15 days of receipt will constitute acceptance." It says, "For additional information concerning the terms and conditions of the buyer, see the reverse side of this document." What I have attached is Exhibit 1, 2 and 3 and 4 is a Grain Purchase Contract, and is the second page the reverse side of the document?

[STEWART FARMS]: Allegedly. All we have is the first page of the document. The reason they weren't attached to the original complaint is we didn't have them. They were in the possession of defendant. This is what was provided.

THE COURT: Okay.

[STEWART FARMS]: That goes to my point that there's no place to initial or reference that these were the terms and conditions of the contract.

THE COURT: Okay. Also, as to the defendant argues that Mr. Henry Stewart ratified the contracts 1 and 2 by his signature [on the first page] in the right – for the record I'm going to say right column of Exhibits 1, 2, 3 and 4, and what I'm going to do is I'm going to have these introduced as the Court's Exhibit 1 to the hearing today. Okay?

. . . .

What is your response to the ratification argument?

[STEWART FARMS]: Our response is that he ratified the front page of these documents. There's not any dispute about the front page of the contracts.

THE COURT: Okay.

[STEWART FARMS]: The question is the reverse side.

THE COURT: Okay.

The circuit court thereafter filed an order denying Erwin-Keith's motion to compel arbitration and made the following pertinent findings:

> 1. This Court has jurisdiction of the subject matter and the parties to this action.
>
> 2. The Court finds that there is no agreement to arbitrate between the parties.
>
> . . . .
>
> 4. The four contracts introduced into the evidence as Exhibits 1, 2, 3, and 4 have standard language in the last paragraph of the contracts that states "concerning the terms and conditions of the Buyer see the reverse side of this document."
>
> 5. The four contracts that were introduced as Exhibits do not have a reverse side. The four contracts listed as Exhibits have an additional page that contains an arbitration agreement that has no reference to the first page of the Grain Purchase Agreement.
>
> 6. The plaintiff did not offer any testimony regarding the signing of the contract and the additional page of the contract with the arbitration language, which was not the reverse side of page 1 of the Grain Purchase Agreement.
>
> 7. That the Court simply cannot find that an arbitration agreement exists between plaintiff, Henry Lee Stewart, Jr., d/b/a Stewart Farms, and Erwin-Keith, Inc., defendant in this matter based on the evidentiary record.
>
> 8. That after considering all of the matters presented, the Court hereby denies the Motion to Compel Arbitration in all respects.

This appeal followed.[1]

[1]Appellant filed a timely motion for reconsideration, which was subsequently deemed denied by the circuit court, but appellant filed its notice of appeal designating only the order

II. *Standard of Review*

An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civil 2(a)(12). On appeal, this court reviews a circuit court's order denying arbitration de novo on the record. *Alltel Corp. v. Rosenow*, 2014 Ark 375. Arbitration agreements are simply a matter of contract between the parties, and any dispute is a matter of contract construction. *Courtyard Gardens Health and Rehab., LLC v. Quarles*, 2013 Ark. 228, 428 S.W.3d 437. We are not bound by the circuit court's decision, but in the absence of a showing that the circuit court erred in its interpretation of the law, we will accept its decision as correct on appeal.[2] *Madison Cos., LLC v. Williams*, 2016 Ark. App. 610, 508 S.W.3d 901.

III. *Whether an Arbitration Agreement Existed*

Appellant's sole argument on appeal is that the circuit court erred in finding that no arbitration agreement existed between the parties based on the evidentiary record. It argues that although it introduced into evidence two separate copied pages, the only conclusion could have been that the first page was a copy of the front page of the contract and that the second page was in actuality a copy of the "reverse page" of the contract. It further argues

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denying its motion to compel arbitration before the circuit court's deemed denial. Under Arkansas Rule of Appellate Procedure–Civil 4(b)(2) (2017), a notice of appeal filed before the disposition of a posttrial motion is effective to appeal the underlying judgment or order, but to also seek an appeal from the grant or denial of the motion, an amended notice of appeal must be filed within thirty days, and we have no such amended notice of appeal in this case. Thus, only the order denying motion to compel arbitration is before us on appeal.

[2]Both parties misstate our standard of review in appeals from an order denying a motion to compel arbitration.

that this must be the only logical presumption because the front page references "terms and conditions," and the second page was entitled "TERMS AND CONDITIONS." It finally reasons that appellee failed to contest that the second page was not the reverse page; therefore, the circuit court erred in denying the motion to compel arbitration. We disagree.

Our supreme court has repeatedly stated that the threshold inquiry is whether an agreement to arbitrate exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent. *Alltel Corp. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005). Because arbitration is a matter of contract between the parties, it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration. *Asset Acceptance, LLC v. Newby*, 2014 Ark. 280, 437 S.W.3d 119. For a party to assent to a contract, the terms of the contract, including an arbitration agreement, must be effectively communicated. *Id.* Therefore, appellant was required to produce specific evidence that appellee was subject to the contract and demonstrate that the arbitration clause in that agreement was communicated to appellee or that it assented to that clause. *See id.*

Here, appellant failed to satisfy its burden to prove that appellee was subject to page two of the alleged contracts and demonstrate that the arbitration clauses in those contracts were communicated to appellee or that it assented to those clauses. Instead, each alleged contract included copies of two separate pages. Although it is plausible, as counsel contends on appeal, that the first page was a copy of the front page and the second page was a copy of the reverse page, there was no affidavit or testimony presented to attest that was the case. Nor is there any other way that we can tell from the second page that those were, in fact,

the terms and conditions referenced on the first page and that those specific terms and conditions were communicated to appellee. For example, another form of proof could have been provided by a signature, initials, or other acknowledgment by appellee on the second page. However, there was no signature, initials, or any other acknowledgment by appellee on the second page.

Although appellant contends that appellee admitted that the second page was the "reverse page," we do not find that to be the case after a full review of the record. After the circuit court expressed its concern at the hearing over whether the second page was, in fact, the "reverse page," appellee stated that it did not have copies of any of the contracts and that appellant provided those documents as the alleged contracts. Moreover, appellee specifically stated "[t]hat goes to my point that there's no place to initial or reference that *these were the terms and conditions of the contract*. . . . There's not any dispute about the front page of the contracts. . . . The *question is the reverse side*." (Emphasis added.) In other words, appellee did contest whether the terms and conditions on the second page were the terms and conditions referenced on the first page as the "reverse side," and we cannot read appellee's statements here as an admission.

Finally, appellant argues in its reply brief that it conclusively demonstrated that the second pages of the contracts were, in fact, the reverse sides of the double-sided contracts in its motion for reconsideration and for expedited ruling. However, appellant did not subsequently amend its notice of appeal to include an appeal from the denial of that motion. Therefore, that documentation is not before us on appeal. Because appellant failed to

produce specific evidence that appellee was subject to page two of the alleged contracts and demonstrate that the arbitration clauses in those contracts were communicated to appellee or that it assented to those clauses despite its burden to do so, we must affirm the circuit court's denial of the motion to compel arbitration.

Affirmed.

GRUBER, C.J., and WHITEAKER, J., agree.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *James M. McHaney, Jr.*, *Randy L. Grice*, and *Hannah E. Wood*, for appellant.

Knapp Lewis Law Firm, by: *Donald E. Knapp Jr.* and *Michael C. Lewis*, for appellee.