

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

CLARK'S TIRE & AUTO SERVICE	:	IN THE SUPERIOR COURT OF
CENTER, INC. AND ALFA AUTO	:	PENNSYLVANIA
WORLD, INC.,	:	
	Appellee	:
		:
	v.	:
		:
AAA MID-ATLANTIC, INC.,	:	
	Appellant	:
		No. 202 EDA 2009

Appeal from the Order entered December 29, 2008,
in the Court of Common Pleas, Philadelphia County,
Civil, February Term, 2008 No. 003341

BEFORE: STEVENS, BOWES, JJ., and McEWEN, P.J.E.

MEMORANDUM: **FILED JULY 22, 2010**

Appellant, AAA Mid-Atlantic, Inc. (AAA), appeals from the interlocutory order¹ of the trial court overruling its preliminary objections to the Second Amended Complaint filed by appellee, Clark's Tire and Auto Service Center, Inc. (Clark's).² We reverse and remand.

As we write only for the parties, and there is little dispute regarding the operative underlying facts, we will provide but a brief summary of the history of this matter. AAA is a well known automobile club that agrees, *inter alia*, to provide roadside assistance to its members. In order to fulfill its mission, AAA has traditionally engaged private subcontractors, of which

¹ This interlocutory order is appealable pursuant to the provisions of Pa.R.A.P. 311(b)(2).

² It bears mention that Alfa Auto World, Inc., though still a party in the proceeding before the trial court, is not participating in this interlocutory appeal.

Clark's is one, to provide the actual roadside assistance, and that relationship has been governed by a written contract. At some point over the last decade, AAA has developed the capacity to directly provide many of the previously subcontracted roadside services, and this development reduced the expected profits of Clark's and other subcontractors.

As a consequence of the disappointed expectations, AAA was subjected to a series of lawsuits brought by various subcontractors claiming a breach of contract. The first of these suits was filed in Philadelphia in 2005 by Seiple's Collision & Restoration, Inc. (Seiple's), and resulted in a jury verdict in favor of Seiple's in the amount of \$123,000.00.³ Thereafter, AAA sought to modify its existing contracts with its remaining subcontractors, including Clark's, and tendered to them contract "amendments" in March and November of 2007. Those amendments provided in relevant part that (1) any dispute between the parties must be resolved in the Courts of the State of Delaware (the March amendment), and (2) any dispute must proceed through arbitration before a private arbitration board, specifically, the National Arbitration Forum (the November amendment). An authorized representative of Clark's signed both of these amendments.

³ A second suit was filed by Price's Lock Service (Price's) in Philadelphia in 2007. This suit has not yet proceeded to trial.

In June, 2008, AAA and Clark's executed a new and separate contract (Agreement) that was intended to govern their relationship.⁴ That contract explicitly provided (1) that any conflicts would be resolved by binding arbitration "regardless of whether the issue or event which is the basis or cause of the controversy occurred before or after the effective date of [the] Agreement," and (2) that the Agreement "constitute[d] the entire agreement between the parties and supersede[d] any and all agreements heretofore in effect between the parties hereto on the subject to which [the] Agreement relates." Roadside Assistance Service Provider Agreement Contract Number 4247, June 1, 2008, p. 13–14, § XVI ¶¶ A, F.

The present litigation was commenced as a putative class action suit in the Court of Common Pleas of Philadelphia in February, 2008, by the filing of a civil complaint by a separate subcontractor, Lou's Towing Company. Subsequently, Clark's was substituted as the lead plaintiff, and an amended complaint—referred to in the record as the "Second Amended Complaint"—was filed in August, 2008, in which Clark's sought, *inter alia*, damages for lost opportunities and reimbursements for prior expenditures. AAA responded to Clark's complaint by filing preliminary objections in which it sought dismissal of the complaint on grounds of, *inter alia*, (1) improper

⁴ As discussed in more detail below, the trial court described this June, 2008, contract as an "amendment" to a pre-existing contract, and analyzed it accordingly. However, the record does not support the trial court's characterization of this document.

venue, and (2) a preexisting “agreement for alternative dispute resolution.”

See: Pa.R.C.P. 1028(a)(1), (6). The trial court, after entertaining extensive argument from the parties, overruled these preliminary objections, and this appeal followed.⁵

AAA, in the brief filed in support of this appeal, now raises the following questions for our review:

Whether the parties’ contract, including the forum selection and arbitration provisions contained therein, are unenforceable on the ground that it was not supported by consideration?

Whether, apart from the issue of consideration, the contract’s forum selection clause is valid and enforceable?

Whether, apart from the issue of consideration, the contract’s arbitration provisions are valid and enforceable?

See: Brief of Appellant, p. 3.

We note at the outset that the trial court, in its opinion in support of its decision,⁶ analyzed the position of AAA as if it was dependent upon three “amendments” to the original operating agreement between the parties, and offered the following rationale:

The facts do not indicate that Clark’s has received any additional benefit as a result of signing the three amendments. Effectively, Clark’s has taken on the burden of both jurisdiction and venue clauses, and, in

⁵ **See:** footnote 1, *supra*.

⁶ We note that the trial judge, as was his prerogative, issued his opinion without having sought a concise statement of errors complained of on appeal from the appellant. **See generally:** Pa.R.A.P.1925(a), (b).

return, AAA has agreed to do no more than that which it was already obliged to. As such, AAA has garnered the benefit of the amendments by imposing venue and jurisdiction clauses that it alone is comfortable with. But, it has not sustained any detriment upon which to balance its contention that adequate consideration exists. Thus, this case is controlled by *Nicolella [v. Palmer]*, 432 Pa. 502, 248 A.2d 20 (1968)] and *Wilcox [v. Regester]*, 417 Pa. 475, 207 A.2d 817 (1965)], and calls for a finding that the three amendments do not meet the consideration requirement. Hence the amendments are invalid along with the venue and jurisdiction clauses contained therein.

Trial Court Opinion, April 7, 2009, p. 6. The record, however, does not support the trial court's characterization of the June 1, 2008 document as an amendment, since it was clearly an independently executed contract sufficient on its face under the Pennsylvania Uniform Written Obligations Act.⁷ Thus, we are compelled to the conclusion that the decision of the trial court to overrule the preliminary objections filed by AAA was in error because that decision was based upon its misperception that all subsequent documents executed by the parties were amendments to the original contract.⁸

Moreover, since the June 1, 2008, contract explicitly provided both a forum selection clause and an arbitration clause, as well as an agreement by Clark's to accept those conditions as applicable to all disputes "regardless of

⁷ Act of May 13, 1927, P.L. 985, No. 474 § 1, 33 P.S. § 6.

⁸ We note that Clark's, in its brief, fashioned its arguments upon a similar misreading of the record. Thus, Clark's has proffered no argument to counter the position advanced by appellant that the June 1, 2008, contract was a validly executed contract under the laws of Pennsylvania.

whether issue or event which is the basis or cause of the controversy occurred before or after the effective date of [the] Agreement," the preliminary objections filed by appellant, absent facts not apparent on this record, should have been sustained as to Clark's.⁹

The trial court did not address Clark's arguments that the forum selection and arbitration clauses were unenforceable on grounds of "adhesion" or "unconscionability." Though we sense little merit in these arguments, especially since Clark's has not sought to rescind the overall contract which continues to provide it with obvious benefits, we will not preemptively address those arguments. Therefore, this case is remanded to the trial court to address those arguments.

Order reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.


Prothonotary

Date: _____

⁹ The obvious effect of this decision would be a conclusion that Clark's has contractually eliminated itself from being a member of the putative class action filed in the Court of Common Pleas that sought recovery from AAA for conduct that occurred prior to September 30, 2005. See: Second Amended Complaint ¶¶ 1-14.