APPEALS COURT

STATE OF SOUTH CAROLINA

SOFI LENDING CORP.

PLAINTIFF / APPELLEE

v.

Appeals Case No. 2022-001577

JAVIS SULLIVAN

DEFENDANT / APPELLANT

_____/

OPENING APPELLATE BRIEF OF THE DEFENDANT / APPELLANT

JAVIS SULLIVAN, APPELLANT

v.

SOFI LENDING CORP., APPELLEE

Trial Court Case No. 2021CP2305124

Appeal from the Court of Common Pleas

Greenville County, South Carolina

APPEALS COURT

STATE OF SOUTH CAROLINA

SOFI LENDING CORP.

PLAINTIFF / APPELLEE

v. Appeals Case No. 2022-001577

JAVIS SULLIVAN

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17 Am. Jur.2d, Contracts, section 70, at page 408.

STANDARD OF REVIEW

The standard of review is *de novo* resulting from an "abuse of discretion", the criteria for which "... occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Eason, 384 S.C. at 479, 682 S.E.2d at 807. *De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings. We must acknowledge that the term "abuse of discretion" is a misnomer in light of the authorized *de novo* review in article V, § 5 of the South Carolina Constitution.

STATEMENT OF ISSUES ON APPEAL

The court proceeded to grant judgment in favor of the plaintiff / appellee when the facts demonstrated that the dispute was the subject of binding arbitration and divested the trial court of jurisdiction to hear the matter on its merits.

Conclusion: The preponderance of the evidence is against the finding of the trial court.

STATEMENT OF THE CASE

The plaintiff / appellee sued the defendant for default on an unsecured debt. Regarding the allegations of a credit agreement, including the exhibits alleging the same, and taken at face value as true, the above captioned matter was subject to compulsory binding arbitration and the plaintiff appellee failed to commence any arbitration proceeding against the defendant or request or otherwise obtain a stay of the arbitration proceeding in order to proceed in court.

The complaint was not a petition for confirmation of any arbitration award as none was sought according to the alleged agreement and according to the allegations in the pleading.

The trial court had no jurisdiction over the credit agreement that was subject to binding arbitration.

LEGAL ARGUMENT

The appellee alleged by attachment to its amended pleading, what it purports to be, an unsecured credit agreement against the defendant / appellant. Admitting all well-pleaded facts, it contains a binding arbitration clause that precludes either party from suing in court and limits them to binding arbitration exclusively in the resolution of all disputes.

The Plaintiff forfeited its right to demand arbitration pursuant to the contract because it filed a complaint without simultaneously seeking the right to arbitrate the controversy. The First District Court of Appeals agrees.

Palmetto Wildlife Extractors, LLC v. Ludy (Court of Appeals of South Carolina) Wells Fargo Bank, NA v. EGIS 521, LLC (Court of Appeals of South Carolina) Davis v. KB Home of S.C., Inc., 394 S.C. 116, 132, 713 S.E.2d 799, 807 (Ct. App. 2011) ("No other South Carolina case has found that a party did not waive their rights to compel [*2] arbitration after a year and a half of litigation."); R&R Landscape & Design LLC v. Broadband Cos. LLC

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. See Cape Romain Contractors, Inc. v. Wando E., LLC , 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability de novo, but will not reverse a circuit court's factual findings reasonably supported by the evidence. Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016). The parties agree the contract is governed by the FAA, the relevant portion of which states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (2018). See also Doe v. TCSC, LLC, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020)

This is further demonstrated in Florida, quoting directly from the July 24, 2013 holding in David Pearson v. Peoples National Bank, Case No. 1D13-0685.

> "While Florida law generally favors arbitration, see Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988), there is a long line of authority holding that arbitration can be waived. The general definition of waiver, namely "the voluntary and intentional relinquishment of a known right or conduct which implies the

voluntary and intentional relinquishment of a known right," applies to the right to arbitrate. Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005); Roger E. Freilich, D.M.D., P.A. v. Shochet, 96 So. 3d 1135, 1138 (Fla. 4th DCA 2012). While actual participation in a lawsuit has generally been held to waive the right to arbitrate, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context. The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right; Raymond James, 896 So. 2d at 711 (quoting with approval Nat'l Found. for Cancer and Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987)).

In the case before us, the Bank did more than participate in a lawsuit; it initiated the lawsuit. "Initiating a lawsuit, or on the part of a defendant, participating in a lawsuit without first seeking arbitration, constitutes an affirmative selection of a course of action which runs counter to the purpose of arbitration." Beverly Hills Dev. Corp. v. George Wimpey of Florida, Inc., 661 So. 2d 969 (Fla. 5th DCA 1995) citing Rosen v. Shearson Lehman Bros., 534 So. 2d 1185 (Fla. 3d DCA 1988), rev. denied, 544 So. 2d 200 (Fla.1989).

Here, SOFI LENDING CORP. (plaintiff / appellee) filed the complaint initiating the civil action first without attempting to comply with the binding arbitration provision alleged in the complaint. The provision requires that "[a]ll controversies, claims, and other matters in question," except disputes related to entitlement to deposits. It did so without simultaneously moving to request a stay and an order compelling arbitration. See Frontage Road Partners, LLC v. McMullen, 934 So. 2d 629 (Fla. 2d DCA 2006) (holding that action of filing a complaint and notice of *lis pendens* based on a contract without simultaneously requesting a stay and an order compelling arbitration waives that party's contractual right to arbitrate); Bonner v. RCC Assoc., Inc., 679 So. 2d 794 (Fla. 3d DCA 1996) (explaining that when contractor filed a complaint for breach of contract and quantum meruit, and filed a notice of lis pendens, without also moving to stay the proceedings pending arbitration until 21 days later, contractor waived right to demand arbitration);

Hough v. JKP Dev., Inc., 654 So. 2d 1241, 1241 (Fla. 3d DCA 1995) (holding plaintiff waived right to arbitration by not simultaneously requesting a stay and an

order of arbitration at the time of the complaint). In fact, the Bank did not file motion to compel arbitration until approximately six months after the filing of the complaint; further, the Bank did not immediately seek mediation of the controversy. Given the undisputed facts before us, the Bank waived its right to demand arbitration and the trial court abused its discretion in staying the civil proceedings below and ordering arbitration."

In the above captioned matter, both the plaintiff's attorney and the defendant's attorney should have carefully reviewed the contract exhibited and acted accordingly. The plaintiff's attorney should have filed a petition to arbitrate with the American Arbitration Association and the defendant's former attorney should have filed a motion to dismiss, much like this one.

The trial court ignored these factual allegations in the complaint and in spite of the defendant's / appellant's timely motion to dismiss, and simply denied the motion to dismiss and then proceeded to hear the case on plaintiff's motion for summary judgment and then granted judgment in favor of the plaintiff.

Additionally, the motion to dismiss was not opposed and the plaintiff / appellee made no objections yet the court granted judgment in favor of the plaintiff.

The applicable law of this case is set forth in the case of Stanley Smith & Sons, Inc. v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984); from this case we quote: A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. If the agreement is manifested by words, the contract is said to be express. If it is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound. Without the actual agreement of the parties, there is no contract. An implied contract, like an express contract, rests on an actual agreement of the parties to be bound to a particular undertaking. The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. 283 S.C. at 433-434, 322 S.E.2d at 477.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003) (citations omitted).

The necessary elements of a contract are offer, acceptance, and valuable consideration. Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 220,

437 S.E.2d 122, 125 (Ct. App. 1993).

A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree. See Restatement (Second) of Contracts § 50 cmt. c (1981); Sauner v. Pub. Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract... exists when both parties exchange mutual promises.").

Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a mutual intent to be bound. Timmons v. McCutcheon, 284 S.C. 4, 9-10, 324 S.E.2d 319, 322 (Ct. App. 1984).

The rule stated in Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161, is here applicable. We quote therefrom the following: "It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other. See Bulwinkle v. Cramer, 27 S.C. 376, 3 S.E. 776, 13 Am. St. Rep. 645. In 6 R.C.L. at page 641, it is said: "But the fact that one of the parties has signed the contract does not require that the other party should do likewise. A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it. . . . If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them." See also 17 Am. Jur.2d, Contracts, section 70, at page 408.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975).

"A contract is the product of two or more consenting minds making a commitment about the same thing, binding on the parties at law or in equity. It is true that where there had been no meeting of the minds on the essentials of the treaty, no contract results. Barber-Paschal Lumber Co. v. Boushall, 168 N.C. 501, 84 S.E. 800.

This "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. McClintock v. Skelly Oil Co., 232 Mo. App. 1204, 114 S.W.2d 181 (Mo. Ap. 1938).

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, . . . the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." Hudepohl Brewing Co. v. Bannister, 45 F. Supp. 201, 203 (D.S.C. 1943) (emphasis added).

Mutual assent to all the essential terms of the agreement is necessary to the formation of a contract. Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978)

See Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct.App. 1984) (express contract is manifested by words, written or oral; implied contract is manifested by conduct but, as with an express contract, the conduct must demonstrate the parties' mutual assent to all essential terms of the contract); see also Morgan v. Honeycutt, 277 S.C. 150, 283 S.E.2d 444 (1981) (silence alone is not conduct constituting acceptance of an offer to contract).

The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. Wakefield v. Spoon, 100 S.C. 100, 84 S.E. 418 (1915).

The execution of a note in payment of an open account operates to cut off all defenses to the account to which the maker then had knowledge where it is clear from the record the person knew or should have known the operative facts upon which the note was based. Barry v. Atlas Metals, Inc., 152 Ga. App. 437, 263 S.E.2d 179 (1979).

The right of a creditor to apply a debtor's payments as it chooses, however, is qualified by the rule that where the creditor knows or should know the source of the funds from which it is paid, the creditor must, irrespective of the instructions of the debtor, apply those funds so as to protect the rights of the person supplying the funds. American Oil, 298 F. Supp. at 534; Rural Plumbing & Heating Inc. v. Hope Dale Realty, Inc., 140 S.E.2d 330 (N.C. 1965); Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co., 135 S.E.2d 178 (Va. 1964).

CONCLUSION

The preponderance of the evidence is against the finding of the trial court.

DATED this 30th day of November, 2021.

Javis Sullivan, Defendant / Appellant
104 Sturbridge Drive
Greenville, South Carolina 29615

APPEALS COURT

STATE OF SOUTH CAROLINA

SOFI LENDING CORP.

PLAINTIFF / APPELLEE

v. Appeals Case No. 2022-001577

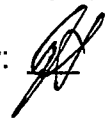
JAVIS SULLIVAN

DEFENDANT / APPELLANT

_____/

CERTIFICATE OF SERVICE

I Javis Sullivan do hereby certify that a true and correct copy of the foregoing was duly served upon the named plaintiff by first class mail, via its attorney Franklin L. Greene, at the address of P. O. Box 481918, Charlotte, NC 28269, on this 2nd day of December, 2022.

By: 

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