

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jan 23 2023

SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

C.A. No.: 2021-CP-02-01306

Regions Bank, an Alabama banking corporationRespondent,

v.

CDIC Development Company, LLC, a South Carolina limited liability companyAppellant.

BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill, SC Bar # 68337
Jonathan D. Klett, SC Bar # 103208
ONE North Main, 2nd Floor
P.O. Box 2048 (29602)
Greenville, SC 29601-2772
T: 864.240.3200
sspruill@hsblawfirm.com
jklett@hsblawfirm.com
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 2

STANDARD OF REVIEW 4

ARGUMENT 4

 I. THE FAA DOES NOT APPLY TO THE PROCEDURAL CONFIRMATION OF AN ARBITRATION
 AWARD IN SOUTH CAROLINA STATE COURT..... 5

 II. EVEN IF THE FAA APPLIED, THE FOURTH CIRCUIT HAS HELD THAT 9 U.S.C.A. § 9 IS
 PERMISSIVE AND NOT A TIME-BAR FOR ENROLLMENT OF ARBITRATION AWARDS..... 6

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

Apex Plumbing Supply, Inc. v. U.S. Supply Co.,
142 F.3d 188 (4th Cir. 1998) 6

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,
529 U.S. 193 (2000)..... 6, 7

Cyber Imaging Sys., Inc. v. Eyclation Inc.,
No. 5:14-CV-901-BO, 2015 WL 2152872 (E.D.N.C. May 7, 2015) 6

Henderson v. Summerville Ford-Mercury Inc.,
405 S.C. 440, 748 S.E.2d 221 (2013) 4, 5, 6

Pearson v. Church of God,
325 S.C. 45, 478 S.E.2d 849 (1996) 4

Photopaint Technologies, LLC v. Smartlens Corp.,
[335 F.3d 152 (2nd Cir. 2003) 7

Real Color Displays, Inc. v. Universal Applied Techs. Corp.,
165 F.3d 19 (Table), 1998 WL 764711 (4th Cir. Oct. 30, 1998)..... 6

Sverdrup Corp. v. WHC Constructors, Inc.,
989 F.2d 148 (4th Cir. 1993) 6, 7

United Gov’t Sec. Officers of Am. v. Special Operations Grp., Inc.,
436 F. Supp. 2d 790 (E.D. Va. 2006) 6, 7

Statutes

9 U.S.C.A. § 9..... passim

S.C. Code Ann. § 15-48-120..... 5, 7

S.C. Code Ann. § 15-48-150..... 5

STATEMENT OF ISSUES ON APPEAL

1. Given the parties' agreement that "[j]udgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction," did the circuit court correctly apply South Carolina law in confirming an arbitration award and directing the entry of judgment?

STATEMENT OF THE CASE AND FACTS

Regions Bank generally agrees with the Statement of the Case and the Facts presented by CDIC Development Company, LLC (“CDIC”). Regions Bank loaned CDIC \$250,000.00 on January 10, 2008 pursuant to a Business Line Agreement (the “Note”). (R. at 22 ¶¶3, 25-27). CDIC defaulted on the Note. (R. at 23 ¶¶4-5). The Note contained a provision requiring that any dispute, claim, and controversy arising from the Note be submitted to binding arbitration. (*Id.* ¶6). The Note provides, “Judgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction.” (R. at 27).

Following the default by CDIC, the dispute between Regions Bank and CDIC was submitted to arbitration as required by the Note. (R. at 23 ¶7). On June 27, 2019, the arbitrator approved a Joint Stipulation and issued a written award to Regions Bank in the amount of \$220,309.81 as of June 21, 2019, which also included interest at the per diem rate \$28.18 accruing thereafter (“Award”). (R. at 28-29). CDIC has not challenged the underlying Award.

Regions Bank filed a petition with the Aiken County Court of Common Pleas to confirm the Award on June 22, 2021. (R. at 22-29). CDIC filed a motion to dismiss on September 7, 2021, arguing the petition was time-barred pursuant to 9 U.S.C.A. § 9, a provision found within the Federal Arbitration Act (“FAA”). (R. at 31-35). The circuit court confirmed the Award on September 27, 2021. (R. at 1-7). CDIC filed a Motion to Reconsider on September 28, 2021, which was granted by order dated November 11, 2021. (R. at 36-38, 8-10). The circuit court then heard CDIC’s pending motion to dismiss on January 31, 2022 and issued an order denying the motion to dismiss, confirming the Award, and directing the entry of judgment on April 12, 2022. (R. at 11-21). This appeal followed.

CDIC does not dispute that it owes Regions Bank the amount required under the Award, nor does it dispute anything relating to the underlying arbitration. Instead, it challenges whether Regions Bank can confirm the award in South Carolina state court based on the date Regions Bank filed its petition.

STANDARD OF REVIEW

This Court “may make its own ruling on a question of law without deferring to the circuit court.” *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 748 S.E.2d 221, 224 (2013) (affirming trial court’s confirmation of an arbitration award as a matter of South Carolina law). In addition, construction of an unambiguous contract is a matter of law for the Court to the extent this appeal requires the Court to construe the arbitration provision of the Note. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996).

ARGUMENT

The Note provides that the FAA applies “to the construction, interpretation, and enforcement **of this arbitration provision.**” (R. at 27 (emphasis added)). The Note also states, “Judgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction.” (*Id.*). CDIC has not argued that the courts of this state lack jurisdiction.

This appeal does not stem from any issue of “construction, interpretation, and enforcement” of the Note’s arbitration provision. As required by the Note, the parties undertook to resolve their dispute through arbitration, resulting in the Award. As further allowed under the Note, Regions Bank sought judgment on the Award in South Carolina state court.

Instead and in the hopes of avoiding entry of a judgment and all that comes with it, CDIC has taken the position that 9 U.S.C.A. § 9 of the FAA applies and required that Regions Bank seek confirmation of the Award within a year. As set forth below and in the circuit court’s order, CDIC is incorrect and its arguments are in direct contravention of South Carolina law and Fourth Circuit precedent.

I. The FAA does not apply to the procedural confirmation of an arbitration award in South Carolina state court.

State law, not the FAA, applies when confirming an arbitration award. *Henderson*, 405 S.C. at 448, 748 S.E.2d at 225. This is because “the FAA does not preempt state *procedural* law relating to arbitration.” *Id.* As set forth in *Henderson*, “[t]he FAA’s substantive provisions apply to arbitration in federal or state courts, but a state’s procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA.” *Id.* at 450, 748 S.E.2d at 226-27.

Confirmation of an arbitration award is procedural, not substantive. *Id.* As such, “section 9 of the FAA applies only in federal court[.]” *Id.*

Given this express holding, the circuit court correctly applied state law and confirmed the award pursuant to S.C. Code Ann. § 15-48-120, which provides as follows:

Upon application of a party, **the court shall confirm an award**, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15-48-130 and 15-48-140.

(Emphasis added). Similarly, S.C. Code Ann. § 15-48-150 requires the issuance of the judgment against CDIC upon confirmation of the Award:

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

Neither of these provisions provide a limitations period for confirmation of an award in the absence of a request to vacate, modify, or correct the underlying award. Accordingly, the plain language of these statutes compelled the circuit court to confirm the Award and direct the entry of judgment.

Nothing about the language of the Note changes this result. In *Henderson*, the parties agreed that any disputes would be submitted to binding arbitration that “shall be governed by the [FAA].” 405 S.C. at 445, 748 S.E.2d at 223. Even given that broad language, the court found that

state law applied to the confirmation process and that 9 U.S.C.A. § 9 did not apply. Here, the arbitration provision in the Note is not quite as broad, stating that the FAA applies “to the construction, interpretation, and enforcement of this arbitration provision.” (R. at 27). The instant dispute does not involve the construction, interpretation, and enforcement of any arbitration provision. The parties proceeded with arbitration as agreed, and now Regions Bank seeks judgment on the Award before a court with jurisdiction also as agreed. Under the clear precedent of *Henderson*, 9 U.S.C.A. § 9 does not apply and the order of the circuit court must be affirmed.

II. Even if the FAA applied, the Fourth Circuit has held that 9 U.S.C.A. § 9 is permissive and not a time-bar for enrollment of arbitration awards.

As set forth above, this matter is settled under South Carolina law and this Court does not need to consider whether the outcome would be different under federal law. Even assuming, however, that federal law might apply, the Fourth Circuit has held that 9 U.S.C.A. § 9 is permissive and does not act as a time-bar for confirmation of arbitration awards. *See Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 192 (4th Cir. 1998); *Real Color Displays, Inc. v. Universal Applied Techs. Corp.*, 165 F.3d 19 (Table), 1998 WL 764711, at *3 (4th Cir. Oct. 30, 1998); *United Gov’t Sec. Officers of Am. v. Special Operations Grp., Inc.*, 436 F. Supp. 2d 790, 794 (E.D. Va. 2006); *Cyber Imaging Sys., Inc. v. Eyelation Inc.*, No. 5:14-CV-901-BO, 2015 WL 2152872, at *2 (E.D.N.C. May 7, 2015). The circuit court included this as an additional basis for its ruling.

Sverdrup Corp. has not been reconsidered by the Fourth Circuit, nor has it been overruled by the United States Supreme Court. CDIC’s citation to *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) as in conflict with *Sverdrup Corp.* is misplaced as explained in *United Gov’t Sec. Officers of Am.* at 794–95. As stated there,

[Defendant], refusing to strike its colors, argues that *Sverdrup* is of limited precedential value in light of the Supreme Court's subsequent decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000). Yet this argument, too, is not persuasive, as the *Cortez* analysis focuses almost exclusively on the FAA's venue provisions and their legislative history, not on § 9's one-year time period. *Id.* at 199, 120 S.Ct. 1331. The Supreme Court in *Cortez* did not analyze any FAA provisions dealing with statutes of limitations. [Defendant] also cites *Photopaint Technologies, LLC v. Smartlens Corp.* [335 F.3d 152 (2nd Cir. 2003)], where the Second Circuit, contrary to *Sverdrup*, construed § 9 as establishing a one-year statute of limitations. Although the Second Circuit's reasoning in *Photopaint* is sound, indeed compelling, **Sverdrup remains controlling precedent in this circuit and district courts are not at liberty to reach a different result. In short, § 9's one-year period is not, in this circuit, a statute of limitations and hence § 9 cannot be used in preference to West Virginia law.**

(Emphasis added). The *Cortez* decision is clearly distinguishable because it did not analyze the FAA provisions dealing with a statute of limitations for confirming awards. For this reason, the circuit court did not err in citing *Sverdrup Corp.* as an additional basis for its ruling.

CONCLUSION

The parties have arbitrated their dispute as agreed, resulting in the Award. CDIC owes Regions Bank \$220,309.81, plus per diem interest. This appeal focuses solely on the narrow issue of confirmation of the Award. Given the language of S.C. Code Ann. § 15-48-120 and the holding in *Henderson*, the circuit court had no choice but to confirm the Award, and this Court must affirm.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill

Sarah P. Spruill, SC Bar # 68337

Jonathan D. Klett, SC Bar # 103208

ONE North Main, 2nd Floor

P.O. Box 2048 (29602)

Greenville, SC 29601-2772

T: 864.240.3200

sspruill@hsblawfirm.com

jklett@hsblawfirm.com

Counsel for Respondent

January 23, 2022

RECEIVED
Jan 23 2023
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

C.A. No.: 2021-CP-02-01306

Regions Bank, an Alabama banking corporationRespondent,

v.

CDIC Development Company, LLC, a South Carolina limited liability companyAppellant.

CERTIFICATE OF COUNSEL

I certify that the Brief of Respondent in this matter complies with Rule 211(b), SCACR.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill

Sarah P. Spruill, SC Bar # 68337

Jonathan D. Klett, SC Bar # 103208

ONE North Main, 2nd Floor

P.O. Box 2048 (29602)

Greenville, SC 29601-2772

T: 864.240.3200

sspruill@hsblawfirm.com

jklett@hsblawfirm.com

Counsel for Respondent

January 23, 2023