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SC Court of Appeals

State of South Carolina
County of Spartanburg

In the Court of Common Pleas
Seventh Judicial Circuit

Southern Wholesale, Inc.,

Plaintiff,

C.A. No. 2012-CP-42-4733

C.A. No. 2012-CP-42-4915

v.

(Consolidated)

Chad Kerr and Jonathan Bryant,

Defendant

Jonathan Bryant,

Plaintiff,

v.

Southern Wholesale, Inc. and Kevin

Fountain,

Defendants.

Jonathan Bryant,

Plaintiff,

v.

Kevin Fountain and Specialty Equipment

Leasing, Inc.,

Defendants.

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[Proposed] Order on Motion for Reconsideration

This matter came before me on a Motion for Reconsideration filed by Kevin Fountain, Southern Wholesale, Inc., and Specialty Equipment Leasing, Inc. (collectively, the "Fountain parties") pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, asking the Court to reconsider and alter or amend its October 9, 2015 Order on the Fountain parties' Motion to Remove and Replace Raymond H. Brandt, CPA as the arbitrator in these consolidated cases. A hearing was held on January 6, 2016, in Spartanburg, South Carolina. Donald C. Coggins, Jr. of Harrison, White, Smith & Coggins, P.C. appeared for the Fountain parties and Scott F. Talley appeared for parties Jonathan Bryant and Chad Kerr.

Whereas, the Court has considered the above-referenced motion, briefs, arguments of counsel, and the record in these consolidated cases, and the Court makes the following findings of fact and conclusions of law:

1. Mediation in these consolidated cases took place on March 17, 2014. Tom Stephenson served as the mediator and Larry Flynn attended in his capacity as Receiver for Specialty Equipment Leasing, Inc. After several hours, a Binding Settlement Agreement was reached. The agreement resolved most of the issues in the cases and provided that the remaining, unresolved issues would be decided by an impartial arbitrator.

2. Thereafter, a more comprehensive settlement document was prepared and executed by the parties. The executed Settlement Agreement and Mutual Release provides that: "The parties will hire Ray Brandt as an arbitrator to resolve the following claims as set forth in (e), (g), and (h) below. In the event Mr. Brandt cannot serve, the attorneys for Fountain, Bryant, and Larry Flynn shall agree on an alternate arbitrator. If they cannot agree, such arbitrator shall be appointed by the Court upon application by any Party."

3. Pursuant to the Binding Settlement Agreement and the executed Settlement Agreement and Mutual Release (collectively, the "Settlement Documents"), the parties and their counsel agreed to the use of Raymond H. Brandt, CPA ("Mr. Brandt") as arbitrator in this matter. Mr. Brandt was charged with acting as an arbitrator of certain disputes as set forth in the Settlement Documents.

4. On or about April 2, 2015, the Fountain parties filed a Motion to Remove and Replace Arbitrator, asking the Court to remove Mr. Brandt as the arbitrator and

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appoint a suitable replacement to resolve those issues left open to arbitration in the Settlement Documents.

5. In the Motion, the Fountain parties requested that the Court to remove and replace Mr. Brandt based on his alleged failure to competently and impartially perform his duties as an arbitrator, his conduct creating a reasonable perception that he cannot decide the parties' remaining disputes impartially and fairly, and his ineligibility to serve as an arbitrator based on the failure to disclose the fact that he is not a certified neutral and obtain the written consent of all parties as required by SCRADR 4(a)(2).

6. The Court initially denied the Motion in an Order filed on October 9, 2015. In the Order, the Court found that, "[t]he Motion before the Court sets out detailed allegations by the moving parties regarding the conduct of the arbitrator, Ray Brandt, pursuant to the Settlement Agreement and Mutual Release." Additionally, the Court ordered that Mr. Brandt to provide all the parties and their counsel copies of any communications or correspondence from him going forward and ordered that "[a]ny verbal communications/telephone communications should include either both parties or both counsel in this matter yet such verbal communication is discouraged by the Court."

7. Thereafter, on October 19, 2015, the Fountain parties filed a Motion for Reconsideration, asking the Court to reconsider and alter or amend the October 9, 2015 Order and find that Mr. Brandt was no longer able to adequately, fairly, and impartially carry out his duties as an arbitrator in this matter. A hearing on the Motion for Reconsideration was held on January 6, 2016.

8. After reviewing and considering the submissions of the parties and the record to date in these cases, the Court is concerned that, in his role as arbitrator in this matter, Mr. Brandt appears to have deviated from the scope of the inquiry as set out in the Settlement Documents. Mr. Brandt's practice of meeting separately with the parties and their counsel appears to have created a perception of partiality or favoritism. The Court notes that Mr. Brandt met with the parties separately as well as counsel separately on occasion.

9. Despite this Court's concerns with Mr. Brandt's conduct of the arbitration process, the Court finds that it would be inefficient and wasteful to completely remove Mr. Brandt as the arbitrator and replace him with another arbitrator at this time. In particular, all of the underlying information regarding the disputed expenses would be the same and all parties have significantly invested in the work done to this point.

10. Accordingly, the Court finds that Mr. Brandt should be allowed to continue with preparing his final report in this matter and shall promptly do so. Prior to the issuance of the final report, however, Mr. Brandt will provide all parties with his draft report and all parties are to be given a reasonable opportunity to provide Mr. Brandt with

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any objections or concerns they may have regarding the numbers or methodology used in report and/or the scope of the report. Any such objections must be provided to the other parties at the same time they are provided to Mr. Brandt.

11. The Court further finds that it would be appropriate to appoint a representative of the Court to oversee Mr. Brandt and the arbitration process and to review Mr. Brandt's report and certify same is in compliance with the scope as set out in the Settlement Documents before the report becomes final and binding. The Court finds that Tom Stephenson, who served as mediator in this case, would be a fit and proper person to serve in that capacity. The parties shall equally share the responsibility for paying Mr. Stephenson for his time and expenses incident to this appointment.

12. Following the issuance of a final report from Mr. Brandt and before Mr. Stephenson's certification of that report as set forth herein, all of the parties, through their counsel, shall be given the opportunity to provide Mr. Stephenson with any submissions relative to the final report.

13. In addition, as part of his review of Mr. Brandt's report and the arbitration process, Mr. Stephenson will be tasked with reviewing the reasonableness of Mr. Brandt's charges for arbitrating this matter.

14. Should Mr. Stephenson find any irregularities in Mr. Brandt's report he shall notify Mr. Brandt of the irregularities in writing with copies to all concerned parties. Within 30 days of his receipt of the notification of irregularities Mr. Brandt will prepare a supplemental report addressing each of the irregularities and identifying what corrective action has been taken, if any. This will be the final report of the arbitrator and any party may take such action thereon as they deem best.

Based on the foregoing, it is hereby **ORDERED** that Mr. Brandt shall be allowed to continue with preparing his final report in this matter, subject to the review and oversight of the parties and Mr. Stephenson as described above. Any report and charges submitted by Mr. Brandt in this matter shall only become final and binding upon the parties after review and certification by Mr. Stephenson as set forth above.

It is so ordered this 12th day of February, 2016.


The Honorable Roger L. Couch

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