

Attachment 1

*(Order Denying Airbnb's Motion to Compel Arbitration,
filed September 13, 2023)*

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Plaintiff,

v.

RHETT RIVIERE, KATHERINE A.
THOMAS, CHASE ENTERPRISES,
LLC OF SOUTH CAROLINA,
AND AIRBNB, INC,

Defendants.

RECEIVED
C/A No. 2021-CP-02-00889
Sep 15 2023
SC Court of Appeals

**ORDER DENYING DEFENDANT AIRBNB'S
MOTION TO COMPEL ARBITRATION**

This matter came before the Court pursuant to Defendant Airbnb's Motion to Compel Arbitration filed on May 15. The motion has been fully briefed, and a hearing was held on the matter on June 13, 2023. Having fully considered the matter, including the motion, responses, exhibits, and the parties' oral arguments, it is hereby **ORDERED** that Defendant Airbnb's Motion to Compel Arbitration is **DENIED**.

BACKGROUND

This action stems from Plaintiff's stay at an Airbnb in Aiken from May 17-18, 2019. Plaintiff's friend, Michelle Jain, booked the Airbnb rental owned and/or hosted by Defendants Rhett Riviere and Kathryn Thomas through her Airbnb account. During the stay, Riviere surreptitiously recorded Plaintiff in various states of undress in the bedroom of the Airbnb rental.

Airbnb alleges that its Terms of Service ("TOS") in effect at the time of the rental provided:

Please note: Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your country of residence is the United States, this provision applies to all disputes with Airbnb. If your country of residence is outside of the United States, this provision applies to any action you bring against Airbnb in the United States. It affects how

disputes with Airbnb are resolved. By accepting these Terms, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.

(Mot. to Compel, Ex. A, Terms of Service at 272) (emphasis in original). Section 19, “Dispute Resolution and Arbitration Agreement,” is a delegations clause that provides:

Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, “Disputes”) will be settled by binding individual arbitration (the “Arbitration Agreement”). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.

Id. at 291 (emphasis in original). Plaintiff was not a party to any contract with Airbnb and did not agree to the TOS or its arbitration provision.

Soon after Plaintiff filed this action on April 28, 2021, Airbnb informed Plaintiff’s counsel several times that it would be filing a motion to compel arbitration. Airbnb, however, did not file a motion to compel arbitration until over two years later. In the interim, Airbnb aggressively litigated this action in court—objecting to extensive discovery propounded by Plaintiff; participating in mediation; filing two motions to dismiss based on the merits; and engaging in numerous discovery disputes. Airbnb filed its Motion to Compel Arbitration after the Court denied its second motion to dismiss; granted multiple motions to compel, and ordered Airbnb to participate in a second Rule 30(b)(6) witness deposition because its designee was unprepared on the noticed topics during the first deposition.

APPLICABLE LAW

“Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it.” *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022) (citation omitted). As such, “courts are [not] to grant blindly all motions to compel arbitration.” *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, No. 20-1187, 2021 WL 1287563, at *3 (4th Cir. Apr. 7, 2021). Moreover, it is always up to the court to determine if the parties have an agreement to arbitrate. *Id.* at 242, 877 S.E.2d at 489 (citing *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010)). *See also Rent-A-Ctr. West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (“If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.”).

Contracts for a transaction involving interstate commerce are governed by the Federal Arbitration Act (“FAA”). *See* 9 U.S.C. § 2. However, whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019). “The presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.” *Id.* (cleaned up). “[B]ecause arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” *Id.* at 337-38, 827 S.E.2d at 173 (emphasis omitted).¹ While federal law governs the

¹Our supreme court has recently returned the legal cliché that the law “favors” arbitration to its proper context, reminding that “statements that the law ‘favors’ arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—‘favoring’ arbitration.”

arbitrability of disputes, state law governs issues regarding contract formation. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

ANALYSIS

As an initial matter, Airbnb raises the question of who is to decide the issue of whether the parties agreed to arbitrate—the Court or the arbitrator.² Because there is a delegation clause in its standard arbitration agreement contained in its TOS, Airbnb argues it a question for the arbitrator. Plaintiff, however, contends that is a question for the Court. The Court finds it is to determine whether a valid arbitration agreement was formed.

“[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (cleaned up) (quoting *Rent-A-Ctr.*, 561 U.S. at 68-69). However, “before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Henry Schein*, 139 S. Ct. at 530 (citing 9 U.S.C. § 2); *see also Granite Rock*, 561 U.S. at 297 (holding that a “court must resolve,” which “always include whether

Simmons v. Benson Hyundai, LLC, 438 S.C.1, 4 , 881 S.E.2d 646, 647 (Ct. App. 2022) (quoting *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)).

² “A party may oppose a motion to compel arbitration by challenging the validity of the arbitration provision, including whether it delegates in ‘clear and unmistakable’ terms the power to an arbitrator to decide issues of arbitrability.” *Novic v. Credit One Bank, Nat’l Ass’n.*, 757 Fed. App’x 263 (4th Cir. 2019) (citing *Rent-A-Ctr.*, 561 U.S. at 70-71 & n.1 “[A]bsent a parties (sic) challenge to the validity of such delegation, courts will not intervene in interpreting the parties’ agreement.” *Id.* Thus, a challenge to a different contract provision, or to the contract as a whole, will not prevent a court from submitting to the arbitrator the question of arbitrability. *Rent-A Ctr.*, 561 U.S. at 71. Plaintiff is challenging both the formation and validity of the arbitration agreement and the delegation clause, not simply whether some issues are subject to arbitration.

the clause was agreed to, and may include when that agreement was formed”). As the Supreme Court held in *Schein* “[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Henry Schein*, 139 S. Ct. at 530 (emphasis added) (citing 9 U.S.C. § 2); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139, 144 (Ct. App. 2013). Accordingly, it is the Court which must first determine whether Plaintiff agreed to arbitrate her claims.

As discussed below, the Court denies Airbnb’s Motion to Compel Arbitration because: (1) direct benefits estoppel cannot be used to bind the non-signatory Plaintiff into arbitration, as she received no direct contractual benefits and suffered harm while staying at the residence that was the subject of the contract; (2) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (3) Airbnb waived its right to enforce arbitration by participating in extensive litigation for over two years.

1) Estoppel

It is undisputed that Plaintiff is a nonsignatory to any agreement with Airbnb, including the TOS.³ In its motion, Airbnb argues that Plaintiff is bound to the TOS, including the arbitration provision under a direct benefits estoppel theory. Airbnb, however, cannot overcome the presumption against arbitration which arises when the party resisting arbitration is a nonsignatory

³ To apply estoppel, Airbnb needs to establish that it had a valid arbitration agreement with Ms. Jain. Whether Ms. Jain entered into a binding arbitration agreement is in dispute. However, the Court need not address this issue because, even if she did, the evidence does not support the application of estoppel against Plaintiff in this case. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

to the written agreement to arbitrate like Plaintiff. Moreover, Airbnb cannot establish that Plaintiff as a nonsignatory received any direct benefits from the TOS.

“Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law.” *Wilson*, 426 S.C. at 338, 426 S.E.2d at 173 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 630 n.5 (2009)). In South Carolina, “[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (internal quotation marks and citation omitted). “In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Id.* (emphasis omitted).

“This legal principle rests on a simple proposition: it is unfair for a party to ‘rely on [a] contract when it works to its advantage, and repudiate it when it works to its disadvantage.’ “ *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) (citation omitted). However, “direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence.” *Wilson*, 426 at 176, 426 S.E.2d at 343. “[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen ‘but for’ the contract’s existence.” *Id.* (citation omitted); *see also Int’l Underwriters v. Triple I: Int’l Inv. Inc.*, 533 F.3d 1342, 1347 (11th Cir. 2008) (holding that a dispute does not arise out of or in connection with a contract for the purposes of arbitration “just because the dispute would not have arisen if the

contract had never existed.”).“Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”)). Finally, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (citation omitted).

Here, Airbnb cannot overcome this presumption. Plaintiff has not sued Airbnb under any provision of the TOS, and she has not exploited any agreement to any degree, let alone to the degree which would warrant the application of estoppel. Rather, Plaintiff is bringing claims imposed by statute or common law. “[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen “but for” the contract’s existence.” *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (citation omitted); *see also Alston v. Conway Manor, LLC*, No. 2021-UP-105, 2021 WL 1227786 (S.C. Ct. App. Mar. 31, 2021) (declining to apply estoppel when the causes of action set forth in the complaint relied on alleged breaches of common law, regulatory, and statutory duties). Thus, the Court finds that the direct benefits estoppel does not apply because Plaintiff is not seeking to enforce the contract.

Moreover, estoppel does not apply because Plaintiff has not received any benefit from any agreement with Airbnb. In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, the Court declined to apply equitable estoppel against nonsignatories to an arbitration agreement between a nursing home and a decedent because

[t]he only agreement from which Respondents even arguably received a benefit was the Admission Agreement because [plaintiff] was admitted to the Facility as a result of it. However, because the Facility allegedly caused [plaintiff's] injuries that later led to her death, we find it difficult to find she benefited even from being admitted.

422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018). Likewise, here, it would be difficult to find Plaintiff received a benefit from staying at the Airbnb rental when Airbnb caused her injuries and her privacy rights to be violated. Further, as discussed above, Plaintiff is not trying to enforce an agreement while attempting to avoid an arbitration provision. *Id.*; see also *Weaver v. Brookdale Sr. Living*, 431 S.C. 223, 233, 847 S.E.2d 268, 273 (Ct. Ap.. 2020) (opining that the plaintiff had not exploited or sought to enforce or benefit from the residency agreement “any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck.”). Therefore, the Court finds that estoppel is inapplicable in this case.

2) Outrageous Acts

South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers. “Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).⁴ The surreptitious recording of Plaintiff while she was undressing in a private area of the Airbnb rental was an unexpected invasion of her privacy and unforeseeable to a reasonable consumer in a normal business dealing. Such unexpected and outrageous conduct could not possibly have been foreseen,

⁴ The Court in *Aiken* also emphasized that a determination of foreseeability is to be made from the standpoint of the injured party. 373 S.C. at 151 n.6, 644 S.E.2d at 709 n.6. See also *Timmons v. Starkey*, 380 S.C. 590, 671 S.E.2d 101, (Ct. App. 2008). On the other hand, Airbnb’s expectations and knowledge regarding hidden cameras is a disputed question of fact in this case.

and thus are outside of any arbitration agreement. Accordingly, the Court declines to enforce arbitration provisions in this case.

3) Waiver

Airbnb has waived any right to compel arbitration by acting inconsistently to arbitration and extensively litigating this case for almost two years before raising the issue of arbitration to the Court.

Waiver “is the intentional relinquishment or abandonment of a known right” a party “knowingly relinquish[es] the right to arbitrate by acting inconsistently with that right.” *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14, U.S. (2022) (internal quotation marks omitted); see also *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (“Waiver is a voluntary and intentional abandonment or relinquishment of a known right.”) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). A party may waive its contractual right to arbitration if it knew of the right and acted inconsistently with that right. *In re Mercury Const. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981), aff’d sub nom. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). “There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.” *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3)

whether the non-moving party was prejudiced by the delay in seeking arbitration.⁵ These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

“[A] party’s extended silence and delay in moving for arbitration may indicate a conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right to arbitrate.” *Martin*, 829 F.3d at 1125 (internal quotation marks omitted). In *Liberty Builders*, the court found the defendant had waived its right to arbitration where the parties sought the court’s assistance numerous times on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCP. 336 S.C. at 666, 521 S.E.2d at 753; *see also Morgan Stanley & Co., LLC v. Couch*, 134 F. Supp. 3d 1215, 1230 (E.D. Cal. 2015), *aff’d*, 659 F. App’x 402 (9th Cir. 2016) (finding waiver where the parties “engaged in extensive discovery for almost a year” and participated in a private mediation before the defendant pursued arbitration under an arbitration agreement); *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-cv-197-SPC-KCD, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) (finding waiver where the defendant litigated for nearly six months, including filing answers, exchanging written discovery, and attending mediation).

⁵ The Supreme Court recently resolved a circuit split and held the party opposing arbitration does not need to show any prejudice to establish waiver of arbitration. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). In any event, Plaintiff has been prejudiced by Airbnb’s delay in raising arbitration. The extensive litigation over the past two years has forced Plaintiff to incur discovery costs that would not have been expended in arbitration. *Evans*, 352 S.C. at 551, 575 S.E.2d at 77 (holding defendant’s continuation of discovery, rather than seeking arbitration in a timely manner, prejudiced plaintiff by forcing her to incur discovery costs that would not have been expended in arbitration).

Here, Airbnb was obviously aware of its arbitration provision in its TOS—as evidenced at the beginning of this action when Airbnb stated its unequivocal intention to file a Motion to Compel Arbitration. (Exhibit A – Email chain with Airbnb’s prior counsel, stating, *inter alia*, “I expect I may be filing a Motion to Compel Arbitration” (May 27, 2021); “my client intends to file a Motion to Compel Arbitration” (July 7, 2021); and finally, “we plan on filing a Motion to Compel Arbitration with our Answer” (July 14, 2021)). However, Airbnb did not file any such motion until after two years of active litigation—answering the Complaint and the Amended Complaint, deposing witnesses, participating in extensive discovery and mediation, and filing numerous motions, including two dispositive motions to dismiss, which the Court denied. Airbnb has engaged in extensive motions practice requiring the Court to devote its limited resources to resolving these motions.⁶ Further, Airbnb filed a motion to be allowed to amend and bring cross-claims against Defendant Thomas and a third-party complaint against defendant Riviere. Put simply, for over two years, Airbnb has acted as if no arbitration agreement existed and actively litigated this case in court and thus waived any right it may have had to arbitration. *Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753 (finding waiver when the parties sought the court’s assistance approximately forty times prior to the filing of the motion to compel, on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCF); *Evans v. Accent Mfg’d Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding waiver where arbitration was neither pleaded nor raised for first nineteenth months of litigation).

⁶ For example, Airbnb opposed Plaintiff’s deposing Airbnb’s 30(b)(6) witness filing a motion for protection and when the Court denied this motion, Airbnb filed a six-page motion for reconsideration and subsequently a 28-page Supplemental Memorandum and then a separate 13-page Supplemental Reply.

Airbnb argues that it reserved its rights to arbitration in its Answer; and there is an express non-waiver provision in the TOS. In the cases Airbnb cites, the defendants asserted arbitration as an affirmative defense. *Id.* Here, while Airbnb asserted nineteen affirmative defenses in its Answer to the initial complaint and twenty-five affirmative defenses in its Answer to the Amended Complaint, none included an arbitration demand. Instead, Airbnb asserted in its introductory paragraph that it was reserving and not waiving its rights to compel arbitration. However, “[a] statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver.” *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016). *See also Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) (“A reservation of rights is not an assertion of rights.”). *Bombardier Trans. (Holdings) USA, Inc. v. HDR Engineering, Inc.*, No. CV-21-01460-PHX-SPL, 2022 WL 17811661, * 3 (D. Ariz. Dec. 19, 2022). Moreover, Airbnb cannot “reserve” its purported arbitration rights while taking inconsistent actions for almost two years. *In Re Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584,591 (5th Cir. 2010) (“A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court.”). Further, as the court held in *Liberty Builders* “the right to arbitrate can be waived even in the face of a no-waiver provision.” 336 S.C. at 667, 521 S.E.2d at 754.

Finally, Airbnb contends that it is now moving for arbitration because of the Amended Complaint, and, in particular, its inclusion of a claim for a violation of South Carolina’s Unfair Trade Practices Act (“SCUTPA”). However, this case has always been about Plaintiff and the harm caused to her during her stay at an Airbnb rental, and the Amended Complaint did not alter the scope in such a way as to revive Airbnb’s alleged right to arbitration. *See Manasher v. NECC Telecom*, 310 F. App’x 804, 807 (6th Cir. 2009) (“[W]e hold that the additional claims contained

in the amended complaint did not substantially alter the scope or theory of this matter in such a way as to revive the defendant's right to compel arbitration"). Furthermore, even if the Amended Complaint revived Airbnb's right to assert arbitration, Airbnb continued to actively litigate and waived its purported right to arbitration once again. Airbnb was on notice of the additional claims when Plaintiff moved to file an Amended Complaint on September 2, 2022. Airbnb, however, answered the Amended Complaint and continued extensively litigating this action in court—participating in extensive discovery and filing numerous motions—and did not move to compel arbitration for almost nine months. Airbnb's actions throughout this litigation evidence a waiver of any right it may have had to arbitration. Accordingly, the Court finds that Airbnb has waived any right it may have had to compel arbitration.

CONCLUSION

Airbnb has actively participated in this litigation for two years now, and thus has waived any right it may have had to arbitrate. Moreover, Plaintiff never agreed to arbitration, and she is not subject to the application of estoppel. Based on the foregoing, Airbnb's Motion to Compel Arbitration is **DENIED**. I have considered and rejected all of the arguments made by Airbnb in favor of its motion to compel arbitration by way of written submission and in the oral argument on the motion.

IT IS SO ORDERED.



Aiken Common Pleas

Case Caption: Julianne Foster , plaintiff, et al VS Rhett Riviere , defendant, et al

Case Number: 2021CP0200889

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.