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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT
FIFTH JUDICIAL CIRCUIT

Alison Renee Lee, Circuit Court Judge

Appellate Court Case No. 2023-000858
Circuit Court Case No. 2022-CP-40-2586

Capella Capital, LLC, Capella Carolinas, LLC, and Michael Lindley,..... Respondents,

v.

Donivon Glassburn, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

October 30, 2023

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TABLE OF CONTENTS

Table of Authorities i

A. The court's finding that there was no valid agreement to arbitrate lacks factual support..... 1

B. The Subscription Agreements' incorporation of the American Arbitration Association ("AAA") Rules constitutes an agreement to send issues of arbitrability to the arbitrator.....2

TABLE OF AUTHORITIES

CASES

Brennan v. Opus Bank, 796 F.3d 1125, 1128-30 (9th Cir. 2015).....3

Granite Rock Co. v. Int'l Bhd. Of Teamsters, 561 U.S. 287 (2010).....2

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) 2

Henry Shein, Inc. v. Archer and White Sales, Inc., __U.S. _, 139 S. Ct. 524, 529, 202 L.Ed.2d 480, 487 (2019).....3

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).....2

Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 527 (4th Cir. 2017).....3

Ward v. Discover Bank, ___F.Supp.3d___, 2020 US Dist. Lexis 69976,*8-9 (D.S.C. 2020) 3

OTHER AUTHORITIES

American Arbitration Association Commercial Arbitration Rules 3

Rule 201, SCRE.....3, 4

A. THE COURT'S FINDING THAT THERE WAS NO VALID AGREEMENT TO ARBITRATE LACKS FACTUAL SUPPORT

When considering the terms of the Subscription Agreements, including the arbitration agreement, their reference to the LLC Operating Agreements, and the allegations of the Complaint, the court could only reach one conclusion—that the parties formed a valid contract to arbitrate. Yet, Lindley hangs his hat on the argument that Glassburn "denied the validity" of the Subscription Agreements, and therefore, Glassburn is estopped from seeking (or has waived the right) to enforce the arbitration agreement therein. This argument appears a concession by Lindley that he signed the Subscription Agreements containing the arbitration clauses. But, he seeks to use Glassburn's alleged post-agreement act of denying the claim that the Subscription Agreements gave Lindley 50% of both companies as a basis to argue that Glassburn should be estopped or has waived his right to arbitration under the same Subscription Agreements. Lindley's Brief restates that argument at least ten (10) times in each part of the 10-page brief. (Brief of Respondent, pp. 2, 3, 6-9). While this argument might, at first glance, appear reasonable, there is simply no law to support this claim under the circumstances of this case.

Lindley does not argue, because he has no support, that Glassburn has substantially invoked the litigation process such to "waive" his right to arbitrate. Instead, Glassburn's first filing in this action was the Motion to Dismiss and Compel Arbitration. Glassburn has not filed an Answer. To conclude that Glassburn has officially staked out a position on Lindley's allegations is premature, in the very least. The only citation Lindley relies on in support of this claim originates in Glassburn's Memorandum in Support of Motion to Compel Arbitration, wherein the author describes the Complaint as follows: [f]urther, the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas [LLC] and Capital [LLC], which Defendant denies, in

various ways including through "executed Subscription for Membership Agreements." (Memo in Support of Mot. to Dismiss and Compel at p. 4, R. p. 038).

Lindley cites to *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion) in an effort to focus on the characterization of a *concededly binding contract* within the analysis of whether the arbitration clause therein applies to a particular type of controversy. (Resp. Br. at p. 6). However, neither of these cases stand for the proposition Lindley looks to propound. In fact, in *Howsam*, the Supreme Court specifically identified the issue of "waiver" as a defense to arbitrability presumptively for the arbitrator to decide. *Howsam*, 537 U.S. at 85.

Lindley does not challenge the formation of the Subscription Agreements. *Cf. Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287 (2010) (a challenge to a contract ratification date was important to determine whether contract was formed at the time the acts that gave rise to the claim at issue arose). He does not deny he signed the agreement, does not present evidence to challenge the formation or validity of the Subscription for Membership Agreement. If there are disputes over the meaning and effect of the Subscription for Membership Agreements on the parties' relationship and financial interest, or over the parties' post-agreement formation conduct and any effect that conduct might have on the contract's enforceability, those are substantive matters for the arbitrator.

In this case, there are simply no facts on which the court could have relied upon to conclude there was no valid agreement to arbitrate.

B. THE SUBSCRIPTION AGREEMENTS' INCORPORATION OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA") RULES CONSTITUTES AN AGREEMENT TO SEND ISSUES OF ARBITRABILITY TO THE ARBITRATOR

The United States Supreme Court in *Henry Shein, Inc. v. Archer and White Sales, Inc*., __U.S. _, 139 S. Ct. 524, 529, 202 L.Ed.2d 480, 487 (2019) held that a court may not decide whether an arbitration agreement applies to the particular dispute if the parties "clearly and unmistakably" delegated the question to an arbitrator, even if the court believes that the argument for arbitrability is "wholly groundless." The trial court in this case failed to address whether the arbitration clause clearly delegated the issue of arbitrability to the arbitrator prior to determining that the arbitration agreement in the Subscription for Membership Agreements did not apply to Lindley's claims.

As a matter of law, the express incorporation of the AAA Rules is clear and unmistakable evidence of an agreement to send issues of arbitrability to the arbitrator. *Brennan v. Opus Bank*, 796 F.3d 1125, 1128-30 (9th Cir. 2015) (gathering other cases from First, Second, Fifth, Eighth, Federal, Eleventh, and D.C. Circuit Courts of Appeal holding that incorporation of arbitral rules such as the AAA, JAMS and UNCITRAL rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability); *see also Simply Wireless, Inc. v. T-Mobile US, Inc*., 877 F.3d 522, 527 (4th Cir. 2017) (JAMS Rules); *Ward v. Discover Bank*, ___F.Supp.3d___, 2020 US Dist. Lexis 69976,*8-9 (D.S.C. 2020) (AAA and JAMS rules).

In this case, it is undisputed that the parties' arbitration agreements expressly adopted the AAA rules. The AAA rules are the proper subject of judicial notice because they can readily be determined from a source whose accuracy cannot reasonably be disputed. *See* Rule 201, SCRE (Rule 201(b) (judicial notice appropriate when a fact is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned), Rule 201(c) (a court may take judicial notice whether requested or not), Rule 201(f) (judicial notice may be

taken at any stage of the proceeding)). The court has authority to take judicial notice of both adjudicative and legislative facts. *See* Notes, Rule 201, SCRE.

The trial court's order should be reversed so that the parties can proceed to arbitration as agreed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

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