THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Court Case No. 2023-00858
Circuit Court Case No.: 2022-CP-40-2586

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

v.

Donivon Glassburn,..... Appellant.

FINAL BRIEF OF RESPONDENT

October 30, 2023

Todd R. Ellis, Esquire (SC Bar 08888)
LAW OFFICE OF TODD ELLIS, P.A.
7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
(803) 732-0123
todd@toddellislaw.com

John A. Ecton, Esquire (SC Bar 66048)
ECTON LAW FIRM
7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
(803) 771-9800
jecton@ectonlawfirm.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. STATEMENT OF ISSUE ON APPEAL

Was the Trial Court correct in denying Appellant's Motion to Dismiss or to Compel Arbitration, when the agreements on which Appellant relies to compel arbitration did not substantially govern the issues raised in the Respondent's Complaint, when those agreements referenced operating agreements that either do not exist or are signed only by Appellant and do not include an arbitration provision.

II. STATEMENT OF THE CASE

The lawsuit involves a dispute between Michael Lindley and Donivon Glassburn over ownership and control of two South Carolina entities, Capella Capital, LLC and Capella Carolinas, LLC (collectively referred to herein as "the LLCs"). While the existence of the entities and the business operations of the LLCs is without dispute, the following facts come from Respondent Lindley's Complaint filed on May 17, 2022. Appellant Glassburn filed a Motion to Dismiss or to Compel Arbitration and did not file a responsive pleading admitting or denying these allegations.

On July 7, 2012, Lindley and Glassburn formed Capella Capital, LLC, to, among other business, purchase and potentially develop commercial real estate and retail centers, purchase and service ATM machines, and purchase bingo video equipment. On March 23, 2013, Lindley, and Glassburn formed Capella Carolinas, LLC, for the sole purpose of purchasing 100% of the stock and membership interest in twelve (12) South Carolina entities/corporations to continue the operation of various charitable bingo facilities in the State of South Carolina.

In the initial years following the formation of the LLCs, Respondent Lindley and Appellant Glassburn each participated in the operational planning and financial decisions involving the bingo halls and related businesses, and their membership interests were reflected in the tax filings for the entities. In recent years, Respondent Lindley asserts that Appellant Glassburn operated the LLCs for his own personal benefit without regard to Lindley's membership interest nor in furtherance of

the best interest of the business of the LLCs. After attempts at resolving these issues, Respondent Lindley ultimately filed this lawsuit and brings claims against Mr. Glassburn for conversion, fraud, breach of fiduciary and breach of duty warranting disassociation. The wrongful acts asserted are extensive but generally relate to Appellant Glassburn denying Lindley access to LLC records and financial and operational input as well as Glassburn's self-dealing in using LLC proceeds and assets for personal benefit. The damages suffered by Lindley are in the millions of dollars.

The only documents signed by the Parties which include any language regarding arbitration are Subscription for Membership Agreements for the LLCs. (The "Subscription Agreements"). (R. p. 104-108) The Subscription Agreements contain the following arbitration provision.

> Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulation then applicable to the American Arbitration Association governing three-member-panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

This provision is found on page 3 of the Capital Subscription Agreement and on page 2 of the Carolina Subscription Agreement. (R. p. 104 and 107).

The Subscription Agreements purport to incorporate operating agreements for each of the LLCs requiring that the Parties be bound by the terms as members. See page 3 of the Subscription Agreement for Capella Capital, LLC and Capella Carolinas, LLC (R. p. 105 and 108). Appellant Glassburn, through a limited exchange of materials in this case, provided an alleged operating agreement for Capella Carolinas, LLC. (R. p. 109-123). Respondent Lindley denies the legitimacy of the operating agreement which is signed solely by Glassburn on April 1, 2014. (R.p.121). No operating agreement for Capella Capital, LLC has been offered, and Lindley asserts that

Glassburn, in furtherance of his efforts to control and solely benefit from the LLCs business, never agreed to sign any operating agreements for which the Parties are bound.

Importantly, Appellant Glassburn asked the trial court to compel arbitration based on the provisions of the Subscription Agreements signed by the Parties at the same time Appellant Glassburn is denying the legitimacy of the Subscription Agreements. On page 4 (R. p. 038) of his Memorandum in Support of his Motion to Dismiss or Compel Arbitration, Glassburn states:

> [t]he Operating Agreements of these companies are specifically referenced in each Subscription Agreement and are thus subject to the arbitration provision. Further, the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas and Capital, **which Defendant denies**, in various ways including through "executed Subscription for Membership Agreements." R. p. 038 See Defendants Memorandum in Support of Motion to Dismiss or Compel Arbitration, page 4, referencing Plaintiff's Complaint, para. 10 (emphasis added).

Appellant asked the trial court to order arbitration on a document he denies binds the Parties and which also references operating agreements that either do not exist or are not signed by both Parties.

Appellant's Motion to Dismiss and Compel Arbitration was heard by the trial court on or about January 26, 2023, and the court denied the motion on April 25, 2023. (Order Denying Motion R. p. 001-003). The trial court's Order is direct and clear on why it was denying the Motion to Dismiss or to Compel Arbitration.

> The parties signed a Subscription for Membership governing the two Plaintiff corporations. These two documents require arbitration and are signed by both parties. The document states that the subscription is "governed by the laws of the State of South Carolina and the Operating Agreement for [the two corporation] which [are] incorporated herein by reference, and hereby agrees to be bound by the same." The requirement for arbitration states that "any claim or dispute arising out of or related to this agreement or breach thereof ... shall be settled by arbitration....." The language requiring arbitration does not clearly apply to the Operating Agreements. The

> Subscription Agreements do not appear to substantively govern the issues raised in the Complaint. Additionally, the Operating Agreement produced to the Court was only signed by Defendant. No operating Agreement with Plaintiff's signature was provided to the Court. This Court also notes that the Operating Agreement submitted does not have any provision requiring or referencing arbitration.
> This motion was filed in lieu of an Answer to the Complaint. Based upon the information presented at this point in the litigation, the motion to dismiss or compel arbitration is DENIED.
> AND IT IS SO ORDERED. (R. p. 001-003 Trial Court Order "Order" dated April 25, 2023)

Appellant filed a Motion to Alter or Amend under Rule 52(b). (Order Denying Motion to Alter, R. p. 004-006). The court denied the motion on May 18, 2023. Appellant filed its Notice of Appeal on May 25, 2023.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. *See Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). *Partain v. Upstate Automotive Group,* 689 S.E.2d 602, 603, 386 S.C. 488, 491 (S.C., 2010). The trial court appropriately ruled on whether the claim was subject to arbitration. Under South Carolina law, if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine that issue. S.C. Code Ann. § 15-48-20(e) (Law. Co-op. Supp. 1989).

ARGUMENTS

1. **THE TRIAL COURT WAS RIGHT IN DETERMINING THE ARBITRABILITY OF THE CLAIM AND NOT DELEGATING THE DECISION TO AN ARBITRAITOR WHEN THE APPELLANT GLASSBURN DID NOT QUESTION ITS RIGHT TO JUDICIALLY DETERMINE THE ISSUE AND APPELLANT DENIED THE VALIDITY OF AN AGREEMENLT BETWEEN THE PARTIES CONTAINING THE ARBITRATION AGREEMENT**

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *See Zabinski v. Bright Acres Associates,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). There is no evidence in the record that the Parties to this action agreed that the arbitrability of the claims would be determined by anyone other than the trial court. In fact, Appellant Glassburn did not raise an objection or direct the trial court to dismiss the case to have an arbitrator determine the issue in his Motion to Dismiss or Compel Arbitration. Appellant Glassburn's Memorandum in Support of Motion to Dismiss or Compel Arbitration. Appellant Glassburn only argues now that the trial court erred in determining the gateway issue of arbitrability. (R. p. 035-038).

Even as he argues this issue for the first time on appeal, Appellant provides no evidence of the Parties required "clear and unmistakable intent" to delegate the question. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed2d 985 (1995). For the trial court to delegate the question or arbitrability, there must be "clear and unmistakable" evidence of such delegation. *Id.* at 944-45, 115 S.Ct. 1920; *Henry Schein, Inc. v. Archer & White Sales, Inc.* ---- U.S. -----, 139 S.Ct. 524, 530, 202 L.Ed2d 480 (2019); *AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed2d 648 (1986); *Doe v. TCSC, LLC,* 846 S.E.2d 874, 877, 430 S.C. 602, 608 (S.C.App., 2020).

Appellant Glassburn's sole argument that the Parties intended to have an arbitrator to decide whether the claims were properly positioned for arbitration is that the arbitration provision within the Subscription Agreements state that arbitration shall be had in accordance with the rules of the American Arbitration Association ("AAA").

Without providing any specific request that the trial court delegate ruling on arbitrability, compel arbitration and allow the arbitrator to determine this threshold issues, the Appellant now

argues for the first time on appeal that the trial court "should have taken judicial notice that the AAA rules, like many other commercial arbitration rules, delegate the issue of arbitrability to the arbitrator." Final Brief of Appellant, page 11, first full paragraph.

Even if this Court looks past the fact that Appellant failed to argue the delegation issue to the trial court and waived this issue on appeal, the trial court did not err on deciding the issue, even with the inclusion of the AAA Rules in the arbitration provision, because the Appellant denied the validity of the very agreement containing the arbitration provision. In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court identified two gateway questions of "arbitrability" that courts must decide unless the parties have clearly and unmistakably agreed otherwise: whether the parties are bound by a given arbitration clause, and "whether an arbitration clause *in a concededly binding contract* applies to a particular type of controversy." 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (emphasis added); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003).

Here, Appellant Glassburn asserts now the he wanted the trial court to delegate the claim to the arbitrator based on the arbitration provision within the Subscription Agreements, while at the same time, he was attempting to deny that the Subscription Agreements contractually provide Respondent Lindley any of the rights to the entities involved in his claim. Appellant is far from conceding a binding agreement between the Parties. On page 4 of his Memorandum in Support of his Motion to Dismiss or Compel Arbitration, Glassburn states:

> [t]he Operating Agreements of these companies are specifically referenced in each Subscription Agreement and are thus subject to the arbitration provision. Further, the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas and Capital, **which Defendant denies**, in various ways including through "executed Subscription for Membership Agreements." R. p. 38 See Defendant's Memorandum in Support of Motion to Dismiss or

Compel Arbitration, page 4, referencing Plaintiff's Complaint, para. 10 (emphasis added).

Appellant Glassburn denies the very contractual purpose of the Subscription Agreements while referencing operating agreements for the subject limited liability companies which he knows do not exist. The Subscription Agreements are an acknowledgment of a subscription of membership where each member is warranting and acknowledging the acquiring of a membership interest. It is that simple. Appellant, presumably to argue to an arbitrator at a later date, claims Respondent Lindley has no membership interest in the LLC entities. Appellant Glassburn is asking this Court to delegate the arbitrability of a claim based on a provision within an agreement he asserts does not bind the parties. Appellant asks this Court to order arbitration on a document he denies binds the Parties and which also references operating agreements that either do not exist or are not signed by both Parties. The trial court did not err in ruling on arbitrability of the claim because that is what the Appellant asked the trial court to do and Appellant has waived his right to ask this Court to reverse the trial court's ruling.

2. THE TRIAL COURT HAD A REASONABLE BASIS TO RULE THAT THE ARBITRATION PROVISIONS IN THE TWO SUBSCRIPTION AGREEMENTS DID NOT COVER THE CLAIMS IN THE CASE.

"A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute." *Simmons v. Lucas & Stubbs Assocs.*, 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct.App.1984). The Court cannot compel arbitration on the Subscription Agreements when the Party seeking arbitration denies the validity of the very document in which the arbitration agreement is contained and directs the court to operating agreements that do not exist, are only signed by one Party, and do not contain an arbitration provision. The effect of the Subscription Agreements, which are the only documents signed by both parties and solely acknowledges that each of the Parties have a fifty percent (50%) interest in

the named entities, is denied by Appellant Glassburn. Specifically, the Appellant asserts that "the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas and Capital, **which Defendant denies,** in various way including through "executed Subscription for Membership Agreements." See Defendant's Memorandum in Support of Motion to Dismiss or Compel Arbitration, page 4, referencing Plaintiff's Complaint, para. 10. (emphasis added). (R. p. 038) The Court cannot compel arbitration where Glassburn denies the viability of the very document that purports to compel the right. Appellant Glassburn's attempt to have this Court reverse the trial court and compel arbitration while at the same time, presumably in arbitration, retaining his right to argue that the very document purportedly requiring arbitration is invalid. "[A] party may not "rely on the contract when it works to its advantage and repudiate it when it works to its disadvantage." *Jackson v. Iris.com*, 524 F.Supp.2d 742, 749 (E.D.Va., 2007) (quoting *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.,* 659 F.2d 836, 839 (7th Cir.1981) (internal quotations and citations omitted).

Further, the Subscription Agreements, nor the Appellant, provide the Operating Agreements setting forth the Parties rights in the LLCs. As the trial court pointed out, "the language requiring arbitration does not clearly apply to the Operating Agreements," and "the Operating Agreement produced to the Court was only signed by Defendant." Order Denying Motion (R. p. 001-003). Additionally, and importantly, the operating agreement produced by Appellant that is only signed by Appellant does not include an arbitration provision or reference arbitration. (R. p. 109-123).

Courts adjudicating motions to compel arbitration conduct a two-step inquiry: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195

(11th Cir. 2008) *Lincoln v. G2 Secure Staff, LLC*, No. 2:20-cv-1954-DCN-MHC, 2020 WL 12772535, at *2 (D.S.C. Nov. 18, 2020), *adopted in*, 2021 WL 5936391 (D.S.C. Jan. 7, 2021) (citing *Chorley Enter., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015)); *O'Bryant v. Flowers Foods, Inc.*, 629 F.Supp.3d 377, 382 (D.S.C. 2022).

The trial court in this matter does not specifically state that the arbitration provision within the Subscription Agreements is invalid, but rather, finds that the Subscription Agreements, which reference operating agreements that do not exist or are signed by both Parties, and "do not appear to substantially govern the issues raised in the Complaint." Order Denying Motion (R. p. 001-003). Respondent Lindley brought an action against Appellant Glassburn asserting conversion, fraud, breach of fiduciary duty and breach of duty warranting disassociation. Appellant, who Respondent Lindley asserts refused to sign operating agreements for the subject LLCs and now submits an operating agreement to this Court which he alone signed in 2014, wishes to compel arbitration based on Subscription Agreements for which he has denied the legal effect of the documents and which do not have the operating agreements referenced therein which would govern these entities.

The trial court rightfully held that arbitration provision in the Subscription Agreements could not have had a significant relationship to the claims in this case when the Party attempting to compel arbitration denies the validity of the underlying document and there are no operating agreements governing these Parties.

CONCLUSION

Therefore, for the reasons set for the above, the Court should affirm the trial court's ruling denying Appellant's Motion to Dismiss or to Compel Arbitration.

RESPECTFULLY SUBMITTED

Todd R. Ellis, Esq. (SC Bar No. 08888)
LAW OFFICE OF TODD ELLIS, P.A.
7911 Broad River Road, Suite 100
(803) 732-0123
todd@toddellislaw.com

John A. Ecton, Esq. (SC Bar No. 66048)
ECTON LAW FIRM
7911 Broad River Road, Suite 100
(803) 771-9800
jecton@ectonlawfirm.com

ATTORNEYS FOR THE RESPONDENT

October 30, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 30 2023
SC Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Court Case No. 2023-00858
Circuit Court Case No.: 2022-CP-40-2586

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

v.

Donivon Glassburn .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCARC.

Todd R. Ellis, Esq. (SC Bar. No. 08888)
The Law Office of Todd Ellis, P.A.
7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
803-732-0123
Todd@ToddEllisLaw.com

John A. Ecton, Esq. (SC Bar No. 66089)
Ecton Law Firm, P.A.
7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
803-771-9800
jecton@ectonlawfirm.com

Attorneys for Respondent

October 30, 2023