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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001211
Case No. 2021-CP-02-00889

Julianne Foster, Plaintiff,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises,
LLC of South Carolina, and Airbnb, Inc., Defendants,

Of which Rhett Riviere is the Appellant,

AND Airbnb, Inc. is the Respondent,

FINAL BRIEF OF APPELLANT

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ISSUES

- I. Whether the Lower Court Erred by Relying on the Direct Benefits Estoppel Doctrine to Deny Riviere's Motion to Compel Arbitration.
- II. Whether the Lower Court Erred by Relying on the Outrageous Torts Exception to Deny Riviere's Motion to Compel Arbitration.
- III. Whether the Lower Court Erred by Concluding Riviere Waived his Right to Arbitrate Airbnb's Claims for Indemnification by Litigating and Settling the Original Plaintiff's Claims.

STATEMENT OF THE CASE

On April 20, 2023, Respondent Airbnb filed a Third-Party Complaint against Appellant Rhett Riviere alleging contractual and common law claims for indemnification. Third-Party Comp. (R. pp. 223-239). Appellant Riviere filed a Motion to Compel Arbitration of the claims alleged by Airbnb on May 23, 2023. Mot. to Compel. (R. pp. 300-303). On May 26, 2023, Appellant Riviere filed a Motion to Dismiss or in the Alternative to Stay the Third-Party Complaint action. Mot. to Dismiss. (R. pp. 304-306). On June 13, 2023, the Honorable Cordell Maddox, Jr. conducted a hearing on Appellant's motions. Tr. p. 1-44. (R. pp. 620-664). On July 26, 2023, the lower court issued a written order denying Appellant's motions. Order. (R. pp. 7-13). On July 27, 2023, Appellant Riviere filed a Notice of Appeal of the July 26, 2023, Order. Notice of Appeal. (R. pp. 466-478).

STATEMENT OF FACTS

Appellant Riviere was originally sued by Plaintiff Foster who alleged that Riviere secretly videotaped her and a friend while staying at a property previously owned by Riviere. Riviere's then girlfriend, Defendant Katherine Thomas, listed this property for rent on Respondent Airbnb's web portal. As the Host, Defendant Thomas agreed to Airbnb's Terms and Conditions of Service. Plaintiff Foster and her friend rented the property through Respondent Airbnb. Plaintiff Foster's

friend completed the rental agreement with Airbnb and agreed to the Terms and Conditions of Service. The Terms and Conditions contained the following agreement:

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.

See Terms of Service § 19.4, Mot. to Compel Arbitration, Exhibit A. (R. p. 276). Furthermore, the Terms of Service also provided that the Arbitration Agreement “evidences a transaction in interstate commerce and thus the [FAA] *governs the interpretation and enforcement of this provision.*” *Id.* § 19.6 (emphasis added). (R. p. 276).

Appellant Riviere settled with Plaintiff Foster and was dismissed from the lawsuit. After Riviere was dismissed, Respondent Airbnb filed a third-party complaint against Riviere in the same action alleging four causes of action: (1) breach of contract; (2) contractual indemnification; (3) interference with contractual relationship; and (4) equitable indemnification. Third Party Complaint. (R. pp. 223-239). In response, Riviere filed a Motion to Compel Arbitration, Mot. to Compel (R. pp. 300-303). and a Motion to Dismiss or in the Alternative to Stay pending the completion of arbitration. Mot. to Stay. (R. pp. 304-306). Airbnb did not oppose Appellant’s Motion to Compel Arbitration. In fact, Airbnb also filed its own motion to compel arbitration of Plaintiff Foster’s claims against it. Tr. pp. 6-15. (R. pp. 625-634). In addition, Plaintiff Foster did not oppose Appellant Riviere’s Motion to Compel arbitration. Nevertheless, the lower court denied Appellant’s unopposed motion. Order. (R. pp. 7-13).

ARGUMENT

The lower court denied Riviere's Motion to Compel arbitration for three reasons: (1) that Plaintiff's claims were not subject to arbitration under the direct benefits estoppel doctrine; (2) outrageous torts exception precluded Appellant from requiring Airbnb to arbitrate its claims; and (3) Riviere waived his right to compel arbitration by participating in the litigation brought by the Plaintiff. The lower court erred.

I. The Direct Benefits Estoppel Doctrine Is Irrelevant to Riviere's Arbitration Demand Against Airbnb.

The lower court concluded that Plaintiff's claims against Airbnb were not subject to arbitration because Plaintiff's friend booked the property through Airbnb and not the Plaintiff. The Court further concluded that the direct benefits estoppel doctrine did not apply to Plaintiff's claims and therefore the Plaintiff Foster was not bound by the arbitration agreement. As a result of these conclusions, the lower court then denied Riviere's motion to compel arbitration of Airbnb's claims for breach of contract, contractual indemnification, interference with contractual relationship and equitable indemnification. The lower court's ruling in this regard is illogical.

The direct benefit estoppel doctrine is applied when a party seeks to enforce an arbitration provision in an agreement against someone who did not sign the agreement. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) Under the direct benefits estoppel doctrine, "[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." *Id.* citing *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012) Here, without question, Airbnb is a signatory to the agreement containing the arbitration provision. Furthermore, Airbnb obtains substantial direct benefits from the agreement. Therefore, the direct benefit estoppel doctrine simply does not apply.

II. The Outrageous Torts Exception Does Not Apply to Airbnb’s Contractual and Common Law Claims for Indemnification

The lower court further relied upon the outrageous tort exception to the enforcement of arbitration clauses. The exception provides that outrageous torts are not subject to arbitration, because such conduct is not within the scope of a consumer’s arbitration agreement. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016). This exception is of questionable validity.

In *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.* 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016) a plurality of the South Carolina Supreme Court concluded that this exception should be abolished in view of the United States Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011). In a concurring opinion, Justice Hearn, joined by Chief Justice Beatty, disagreed that the outrageous tort exception as recognized in South Carolina has been vitiated by *Concepcion*. Justice Hearn opined that “the outrageous and unforeseeable torts exception remains a viable principle of law after *Concepcion*, because it embodies a generally applicable contract principle: effectuating the intent of the parties. *Id.* Justice Hearn reasoned, “abolishing the “exception”—allegedly applicable only to arbitration—could lead to absurd results, such as forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement.” *Id.*

Regardless of whether the outrageous tort exception remains viable, this exception does not apply to Airbnb’s contractual and common law claims for indemnification. Obviously, Airbnb intended such claims to be within the scope of their arbitration agreement. Section 18 of the Terms of Service provide that the property Host “agree to release, defend (at Airbnb’s option), indemnify, and hold Airbnb...harmless from and against any claims, liabilities, damages, losses, and

expenses...arising out of or in any way connected with...your breach of any laws, regulations, or third-party rights.” Third-Party Comp. ¶ 28. (R. p. 231 ¶ 28). The Third-Party Complaint specifically alleges that Riviere violated state law and the privacy rights of Plaintiff Foster.

Furthermore, Airbnb agreed that any dispute as to whether the Arbitration Agreement applies to a claim will be decided by the arbitrator, not the courts. Terms of Section 19.4 state:

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.

(R. p. 276).

Although the Federal Arbitration Act presumes parties intend that the court, rather than an arbitrator, will decide “gateway” issues related to arbitration, the parties may delegate these gateway issues to an arbitrator provided there is “clear and unmistakable” evidence of such delegation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45, 115 S.Ct. 1920 (1995); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, — U.S. —, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019); *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). If such a delegation occurred, the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). Here, Airbnb has never made any specific challenge to the delegation provision in its own arbitration agreement. Thus, to the extent there is a question as to whether the arbitration agreement covers Airbnb’s claims, Airbnb agreed for an arbitrator to decide the question, not the lower court. Therefore, the lower court erred by relying upon the outrageous torts exception to the enforcement of arbitration agreements.

III. Riviere Moved to Compel Arbitration Upon Being Served with the Third-Party Complaint and Did Not Waive His Right to Arbitrate Airbnb’s Contractual and Common Law Indemnification Claims.

The Third-Party Complaint was filed on April 20, 2023, and subsequently served upon Riviere. Third-Party Comp. (R. pp. 223-239). Riviere filed a Motion to Compel Arbitration on May 23, 2023, and a Motion to Dismiss or in the Alternative to Stay the Third-Party Complaint on May 26, 2023. Mot. to Compel. (R. pp. 300-303); Mot. to Dismiss. (R. pp. 304-306). Riviere did not engage in any discovery with Airbnb upon being served with the Third-Party Complaint. The lower court erroneously concluded that Riviere waived his right to arbitrate Airbnb’s claims because he litigated and settled Plaintiff Fosters claims. This is non-sense for the simple reason that Riviere, who is a non-signatory to the Airbnb Terms of Service agreement¹, did not have an agreement to arbitrate Plaintiff Foster’s claims, who is also a non-signatory to Airbnb’s Terms of Service.

Even if Riviere had an arbitration agreement with Plaintiff Foster, which he does not, the fact that Riviere chose to waive his right to arbitrate Foster’s claims is no proof that Riviere intended to waive his right to arbitrate Airbnb’s claims, which were first asserted after Riviere was dismissed from the original action by Plaintiff Foster. *See Morgan v. Sundance, Inc.* 142 S. Ct. 1708, 1714 (2022) (waiver is the intentional relinquishment of a known right). The Supreme Court in *Sundance* articulated the following test, “Did Sundance...knowingly relinquish the right to arbitrate by acting inconsistently with that right.” *Id.* As applied to Riviere, the answer is a resounding no! Riviere did not engage in any acts that are inconsistent with his right to require Airbnb to arbitrate its contractual and common law indemnification claims against him.

¹ Defendant Katherine Thomas is the “Host” on the Airbnb platform, and she agreed to the Terms of Service, not Riviere.

CONCLUSION

The lower court erred by denying Riviere's Motion to Compel Airbnb to arbitrate its contractual and common law claims against Riviere pursuant to the arbitration in Airbnb's Terms and Conditions of Service agreement. The direct benefits estoppel doctrine and outrageous tort exception to the enforcement of arbitration agreements are simply not applicable. Furthermore, Riviere moved to compel arbitration in direct response to the third-party complaint served upon him by Airbnb, without engaging in any discovery in circuit court. Riviere has not taken acts from which the lower court could conclude he relinquished his right to arbitrate Airbnb's claims against him. For these reasons, Riviere respectfully requests this Court reverse the lower court's decision to deny Riviere's Motion to Compel Arbitration.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, James M. Griffin, certify that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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