RECEIVED
Jan 17 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similary situated, ...Respondents,

v.

Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

INITIAL BRIEF OF APPELLANTS

Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

ISSUES ON APPEAL

1. Whether the circuit court erred in denying Pacifica's motion to compel Plaintiffs' claims to arbitration where Pacifica provided uncontroverted evidence of the full text of the Arbitration Agreement contained in the Residence and Services Agreement executed by Plaintiffs' attorney-in-fact Karen Ward?

STATEMENT OF THE CASE

This appeal arises from a putative class action related to air conditioning outages at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility"). (*See* Pl.'s Compl.). Plaintiffs Eugene and Ruth Villanova resided in independent living apartments at the Facility and brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents. The chief allegation is that air conditioning outages in July of 2021 were caused by Pacifica's failure to properly maintain the facility. (*Id.*).

In December 2019, Ms. Ward executed Pacifica's standard Residence and Services Agreement on behalf of Plaintiffs ("the Residence and Services Agreement" or "the Agreement"), and Plaintiffs moved into Pacifica. (*See* Executed Residence and Services Agreement, Ex. A to Mem. in Supp. of Mot. to Compel Arbitration). The Agreement outlines the terms and conditions governing Plaintiffs' residence at Pacifica, including an Arbitration Agreement. (*Id.*). In connection with this litigation, Pacifica searched for and located a copy of the Agreement executed by Ms. Ward on behalf of Plaintiffs. (*Id.*). The Agreement includes the following provision above paragraph twelve:

> required by court order. Each party shall bear its own costs and fees in connection with the arbitration, unless otherwise provided by law. You may withdraw your agreement to arbitrate within thirty (30) days after signing this Agreement by giving written notice of your withdrawal to the Community. After termination of the Agreement, this arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date. In the event that any part of this arbitration clause is determined to be unenforceable, the remaining portions of the clause shall remain valid and shall be enforced by the parties. The parties shall select

> an arbitrator in accordance with the Federal Arbitration Act. If the Federal Arbitration Act does not permit arbitration in accordance with this clause, then the matter shall be arbitrated in accordance with State law.
>
> **By signing below, you warrant this Arbitration Agreement has been explained to you, that you understand its significance, that you voluntarily agree to be bound by it**, and that you understand that agreeing to arbitration is not a condition of admission to the Community.

(*Id.*) (emphasis added) (this portion of the Agreement is hereafter referred to as the "Arbitration Agreement"). Ms. Ward's signature immediately followed. (*Id.*). The Agreement is missing the page immediately preceding the above Arbitration Agreement.

Pacifica moved to compel Plaintiffs' claims to arbitration pursuant to the Arbitration Agreement within the Residence and Services Agreement. (*See* Pacifica's Mot. to Compel Arbitration). Although Pacifica did not locate a complete copy of the Agreement, Pacifica submitted an affidavit from Debra Kimbrell, the Business Office Director for Pacifica, testifying to the language of the full Arbitration Agreement included in all of Pacifica's Residence and Services Agreements at the time Plaintiffs moved into the Facility. (*See* Aff. of D. Kimbrell at ¶ 5, Ex. B to Mem. in Supp. of Mot. to Compel Arbitration). As more fully explained in Ms. Kimbrell's affidavit, the Agreement is missing the page preceding Ms. Ward's signature, which is labeled subparagraph eleven and titled "**Arbitration**". (*Id.* at ¶ 6.) As is evident from the complete Arbitration Agreement attached to Ms. Kimbrell's affidavit, the scope of the signed arbitration clause is broad – the parties agreed to binding arbitration of "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims". (Standard Residence and Services Agreement, Ex. 1 to Aff. of D. Kimbrell).

On April 1, 2022, Pacifica filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCP, or in the alternative, to Stay and Compel Arbitration. (*See* Pacifica's Mot. to Compel Arbitration). Following a hearing, the circuit court denied the Motion to Compel Arbitration on July 13, 2022. (*See* Judge Keesley Or. Denying Mot. to Stay and/or Compel Arbitration, July 13, 2022). Plaintiffs did not dispute that Ms. Ward signed the Agreement containing the Arbitration Agreement; instead, Plaintiffs asserted that Pacifica's failure to produce a full copy of the Arbitration Agreement precluded arbitration in this case. The circuit court concluded that, because Pacifica did not "produce a copy of an executed contract containing the full arbitration agreement," Pacifica could not make the necessary showing that the right to a jury trial was waived. (*Id.* at 2).

Pacifica filed a timely Motion to Reconsider pursuant to Rule 59(e), SCRCP, and sought clarification concerning the basis of the court's ruling given the undisputed fact that Plaintiffs' lawful attorney-in-fact signed the Arbitration Agreement. Specifically, Pacifica asked the court to clarify whether it found that Pacifica was legally precluded from supplying certain terms of the Agreement by extrinsic evidence, or whether it found that the specific evidence presented by Pacifica in this case was insufficient to supply the missing terms. (*See* Pacifica's Motion to Reconsider). The circuit court denied the Motion to Reconsider without clarifying the basis for its ruling beyond reiterating that a complete copy of the Agreement had not been produced. (*See* Judge Keesley Or. Denying Mot. to Reconsider, July 24, 2023). This appeal timely followed.

STANDARD OF REVIEW

A trial court's determination concerning arbitrability is subject to de novo review. *See Johnson v. Heritage Healthcare Estill, LLC,* 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016). Nevertheless, a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592

S.E.2d 50, 51 (Ct. App. 2003). Issues of law, however, are reviewed without any particular deference to the trial court. *See e.g. Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

ARGUMENT

I. The circuit court erred in denying Pacifica's Motion to Compel Arbitration.

The clear language of the Agreement, considered with the uncontroverted affidavit testimony of Pacifica Business Office Director Deb Kimbrell, yields only one conclusion: the Agreement included a valid Arbitration Agreement at the time it was signed by Plaintiffs' attorney-in-fact. The circuit court erred in concluding that Pacifica did not make the necessary showing that Plaintiffs agreed to arbitration merely because Pacifica could not produce a complete copy of the 2019 Residence and Services Agreement at the time Plaintiffs filed their lawsuit in 2021.

The circuit court's Order denying Pacifica's Motion to Compel Arbitration necessarily rested on one of two premises: (a) that a party may not refer to extrinsic evidence to supply a missing term in an arbitration agreement as a matter of law; or (b) that a party may refer to extrinsic evidence to supply a missing term, but the uncontroverted affidavit testimony and supporting documentation submitted by Pacifica was insufficient to do so in this case.

Neither the Plaintiffs nor the circuit court cited any authority that precludes consideration of extrinsic evidence, such as Ms. Kimbrell's affidavit testimony, to supply the missing portion of the Arbitration Agreement. Pacifica submitted credible and uncontroverted evidence concerning the terms of the missing portion of the Arbitration Agreement. Thus, the circuit court erred in disregarding the uncontroverted evidence of the terms of the full Arbitration Agreement, and Pacifica respectfully requests this Court reverse the circuit court and compel arbitration pursuant to the Arbitration Agreement.

A. Pacifica proved the terms of the Arbitration Agreement by affidavit testimony.

In determining whether parties agreed to submit a particular dispute to arbitration, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Johnson v. Circuit City Stores,* 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920 (1995)); *see also Arrants v. Buck,* 130 F.3d 636, 640 (4th Cir.1997) ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."). Under South Carolina law, a court ordinarily is not allowed to consider extrinsic, or parol, evidence related to the meaning of contractual terms where the written contract appears to express the whole agreement of the parties. *See Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520, 386 S.E.2d 259, 261 (Ct. App. 1989). However, "where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent." *Id.* In cases where "the writings laid down show upon their face an incompleteness, then that which makes them complete may be shown by parol [evidence]." *Midland Timber Co. v. Furman*, 111 S.C. 287, 289-90, 97 S.E. 831, 831 (1919).

The missing page in the Agreement creates an ambiguity as to the intention of the parties because, while it is clear the Agreement contained an Arbitration Agreement, the Agreement does not contain the provision in its entirety. In an effort to clarify this ambiguity, Pacifica submitted affidavit testimony with its Motion to Compel Arbitration demonstrating that the Arbitration Agreement included, *inter alia*, the following language:

> By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be

> brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(Standard Residence and Services Agreement, Ex. 1 to Aff. of D. Kimbrell). Ms. Kimbrell further testified that Pacifica used the same arbitration clause in each of its Residence and Services Agreements at the time Plaintiffs were admitted to the facility. (Aff. of D. Kimbrell at ¶ 5-6).

The circuit court erred in concluding that a missing page of the Agreement precludes compelling arbitration in this case. (*See* Judge Keesley Or. Denying Mot. to Stay and/or Compel Arbitration, July 13, 2022). Plaintiffs have not disputed the authenticity of the Agreement produced by Pacifica with its Motion to Compel Arbitration and have not denied that Ms. Ward separately signed the Arbitration Agreement in connection with the Villanovas' admission to the Facility. Likewise, Plaintiffs did not challenge the substance or admissibility of Ms. Kimbrell's affidavit testimony. Plaintiffs have not presented any generally applicable contract defenses to the Agreement or criticisms of the terms of the Arbitration Agreement as supplied by Ms. Kimbrell's affidavit, and they did not present any authority suggesting the court could not properly consider such evidence to supply the missing terms of the Arbitration Agreement.

Even though Pacifica produced a copy of the Agreement that includes Ms. Ward's signature immediately below the language acknowledging that Ms. Ward understood and agreed to the Arbitration Agreement, Plaintiffs contend that they should not be bound to arbitration because Pacifica is missing a page of the Agreement. In short, Plaintiffs seek to avoid their contractual obligations because Pacifica misplaced a page of the Agreement.

The fact that there are missing pages to the Agreement is of no import in analyzing whether to compel arbitration because the missing terms are easily supplied through an objective method. "[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold

the parties to their bargain." *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (1991) (citing 1 Williston, Contracts § 46, at 152–153 (3d ed.)). *See also* 12 Williston on Contracts § 34:3 (4th ed.) ("Any doubt concerning the terms of an agreement or to supply missing terms in an otherwise valid agreement may be resolved in light of any relevant course of dealing, usage of trade, or course of performance.") (citing *Rossi v. University of Utah*, 2021 UT 43, 496 P.3d 105 (Utah 2021)). These authorities are in accord with South Carolina law. *See e.g. Columbia East Associates*, 299 S.C. at 520, 386 S.E.2d at 261 (explaining when it is appropriate to refer to extrinsic evidence in interpreting a contract); *Frewil, LLC v. Price*, 411 S.C. 525, 531, 769 S.E.2d 250, 253 (Ct. App. 2015) (permitting parol evidence where written contract contained an ambiguity); *Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 190 F.3d 252, 254 (4th Cir. 1999) (applying South Carolina law to conclude that usage of trade, established via affidavit, could supply terms of sale where a manufacturer lost the original sales agreement).

Here, the affidavit of Debra Kimbrell establishes the terms of the Arbitration Agreement through an objective method of comparison to other Residence and Services Agreements signed during the same general time frame. (Aff. of D. Kimbrell at ¶ 6.). The arbitration provision in each of the agreements is identical, and the portion of the Arbitration Agreement contained in the Agreement signed by Ms. Ward matches those other agreements word for word. (*See* Aff. of D. Kimbrell). The circuit court erred in disregarding this uncontroverted evidence and failed to give effect to the true and complete intent of the parties to the Agreement. In so doing, the court effectively placed an arbitration clause on unequal footing with contracts generally, in violation of a well-established principle in the arbitration setting. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). This point can be illustrated with a simple example. Assume, for example, that the same parties had a disagreement concerning the monthly rent for

the Villanovas' apartment and the only copy of the parties' agreement was illegible with respect to the rent amount. It is inconceivable that the court would refuse to consider evidence presented by Pacifica as to its standard rent amount during the time frame when the admission occurred, supported by affidavit testimony and Residence and Services Agreements entered with other residents during that same period. Yet here the circuit court erroneously disregarded credible, unchallenged evidence concerning the missing terms of the Arbitration Agreement.

Plaintiffs' only challenge to Ms. Kimbrell's affidavit testimony is that the affidavit does not say that Ms. Ward was presented with the full Arbitration Agreement at the time she executed the Agreement. (*See* Plaintiffs' Memo in Opp. to Pacifica's Mot. to Compel Arb.). However, Ms. Kimbrell *did* testify that, based on her investigation, "the only reasonable inference" is that the complete Arbitration Agreement was included when Ms. Ward signed the Agreement because Ms. Ward acknowledged as much when she separately signed the Arbitration Agreement. (Aff. of D. Kimbrell at ¶ 6). Ms. Ward is presumed to have read and understood the consequences of the Arbitration Agreement by virtue of her signature after the following language: "By signing below, you warrant that this Arbitration Agreement has been explained to you, that you understand its significance, that you voluntarily agree to be bound by it, and that you understand that agreeing to arbitration is not a condition of admission to the Community." (*See* Executed Residence and Services Agreement, Ex. A to Mem. in Supp. of Mot. to Compel Arbitration).

"A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. . . . Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). Ms. Ward acknowledged that the Agreement included an Arbitration Agreement and that she read and

understood the significance of the provision. Thus, to ascertain the true intent of the parties to the Agreement, this Court must consider the uncontroverted affidavit testimony of Ms. Kimbrell in relation to the missing portion of the Arbitration Agreement.[1]

B. The terms of the Arbitration Agreement constitute a valid, binding arbitration provision that encompasses Plaintiffs' claims in this suit.

The Arbitration Agreement that was contained in the Residence and Services Agreement covers all the parties to this action and all the claims asserted in the Complaint. The arbitration provision is broadly written to encompass and apply to "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community. . . ." This language plainly covers all causes of action asserted in the Complaint, all of which arise from the Villanovas' residence at Pacifica.[2]

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski* v. *Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth.* v. *Great W Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). Moreover, "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers* v. *FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers*,

[1] Neither of the circuit court's Orders appear to reach a factual conclusion as to the weight of Ms. Kimbrell's affidavit testimony. Therefore, Pacifica submits this Court is permitted to review this factual issue *de novo*.

[2] The application of the Federal Arbitration Act has not been challenged in this case and was not addressed by the circuit court, so a full discussion of the issue is not included in this brief. However, Pacifica included a thorough explanation for why the FAA applies in this case in its memorandum in support of Pacifica's motion to compel arbitration. (Pacifica's Mem. in Support of Mot. to Compel Arb., p. 3-7). *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (finding nursing home residency agreement implicated interstate commerce because, *inter alia*, defendant was "contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce" and noting "many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA.").

> Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract but **embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. at 109-10, 739 S.E.2d at 214 (internal citations omitted) (emphasis added). Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken* v. *World Fin. Corp.*, 373 S.C. 144,151,644 S.E.2d 705, 709 (2007). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110. *See also Landers*, 402 S.C. at 109, 739 S.E.2d at 214 ("The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.") (internal citations omitted). A dispute related to utilities and maintenance of the Pacifica facility falls squarely within the category of disputes that are subject to mandatory arbitration pursuant to the Arbitration Agreement in the Residence and Services Agreement.

Additionally, as the Plaintiffs' attorney-in-fact, Ms. Ward clearly had authority to enter into the Agreement, including the agreement to arbitrate all claims relating to the Plaintiffs' residence at Pacifica. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017) (reversing state law frustrating Federal Arbitration Act's purpose where agreement to arbitrate was within scope of power of attorney in nursing home context). Importantly, Plaintiffs have not challenged Ms. Ward's capacity to agree to the Arbitration Agreement on their behalf. Thus, Plaintiffs are compelled to arbitrate their claims in this case pursuant to the valid and binding Arbitration Agreement contained in the Residence and Services Agreement.

CONCLUSION

For the foregoing reasons, Pacifica requests this Court reverse the circuit court and stay this lawsuit in favor of arbitration or remand the case to the circuit court with instructions to compel the lawsuit to arbitration.[3]

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

s/*Paul E. Allen, Jr.*
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellants

[3] Because the Arbitration Agreement does not expressly approve of class arbitration, only the Villanovas' claims can be compelled to arbitration, not the putative class action claims. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").