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Apr 10 2024

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. 2023-001479

Case No. 2021-CP-02-00889

Julianne Foster Respondent,

v.

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

of which

Airbnb, Inc., is the..... Appellant,

and

Rhett Riviere is a..... Respondent.

**RESPONDENT JULIANNE FOSTER'S MOTION FOR
CERTIFICATION UNDER RULE 204(B), SCACR**

Pursuant to Rules 204(b) and 260 of the South Carolina Appellate Court Rules, Respondent Julianne Foster, through her undersigned counsel, respectfully moves this Court to certify this case for review before it is determined by the Court of Appeals. This case concerns issues of significant public interest and legal principles of major importance such that certification is warranted under Rule 204(b). Accordingly, the Court should grant certification.

I. Background Facts/Procedural History

This action stems from Respondent's stay at an Airbnb in Aiken from May 17-18, 2019. Respondent's friend, Michelle Jain, booked the Airbnb rental owned and/or hosted by Airbnb Hosts, Defendants Rhett Riviere and Katherine Thomas. During the stay, Riviere surreptitiously recorded Respondent in various stages of undress in the bedroom of the Airbnb rental. Based on this egregious invasion of her privacy while staying in an Airbnb rental, Respondent filed this action on April 28, 2021, asserting claims against Riviere, Thomas, and Airbnb.¹ After Respondent settled with Riviere in December 2022, Airbnb brought a Third-Party Complaint against Riviere for indemnification.

Airbnb alleges its Terms of Service ("TOS"), in effect at the time of the rental, included an arbitration provision. However, there is no dispute that Respondent never entered into *any*

¹ Respondent filed a motion for leave to file an amended complaint on Sept. 2, 2022, which added several causes of action. Airbnb vigorously opposed this motion, but the circuit court granted the Motion to Amend. Respondent filed her Amended Complaint on Nov. 30, 2022. Without asserting any right to arbitration, Airbnb filed a motion to dismiss the Amended Complaint and continued to litigate and engage in discovery disputes. After denial of the Motion to Dismiss, Airbnb answered on April 20, 2023, and continued litigating, filing for Arbitration on May 15, 2023.

agreement with Airbnb and that it was Ms. Jain who held an Airbnb account and booked the rental.²

Airbnb did not assert any claim for arbitration when this action was first filed. Instead, Airbnb waited for over two years while aggressively litigating this action in court—participating in extensive discovery and mediation, filing two motions to dismiss based on the merits, and engaging in numerous discovery disputes. After the circuit court denied its second motion to dismiss and granted Respondent’s motions to compel production, Airbnb retained new counsel and filed a motion to compel arbitration. On September 15, 2023, the circuit court denied Airbnb’s Motion to Compel Arbitration on three separate grounds, and Airbnb subsequently filed this appeal. The case below has been stayed.

II. Applicable Legal Rule

South Carolina Appellate Court Rule 204(b) provides:

In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

Rule 204(b), SCACR (underline emphasis added).

III. ARGUMENT

This case is currently pending before the South Carolina Court of Appeals. The issue is whether Plaintiff should be deprived of her constitutional right to a jury trial and forced to arbitrate her claims despite never having entered into any agreement with Airbnb. The Court should certify this case for review because it concerns issues of public interest and legal

² Respondent disputes whether Ms. Jain entered into an agreement to arbitrate. The circuit court did not need to reach this issue, as it denied the Motion to Compel Arbitration on other grounds.

principles of major importance. Rule 204(b), SCACR. Moreover, the Court has previously certified appeals in cases which raised issues about arbitration. *See, e.g., Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014); *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013); *Crouch Constr. Co., Inc. v. Causey*, 405 S.C. 155, 747 S.E.2d 482 (2013); *Cape Romain Contractors, Inc., v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 585 S.E.2d 581 (2003). This case raises both legal principles of major importance and issues of public concerns. In particular, this case concerns the ability of plaintiffs to be free from being forced to arbitrate their claims when they did not agree to arbitration.

Collateral “Arbitration” Litigation is a Critical Issue in Need of Resolution

“Arbitration is available only when the parties involved contractually agree to arbitrate.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). “Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so.” *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (citation omitted). Moreover, “[a]rbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays.” *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). In *Evans v. Accent*, the Court of Appeals referenced a finding of prejudice to the non-moving party “where a party sought arbitration after engaging in litigation over approximately two and one-half years.” *Id.* at 77 (citing *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753 (Ct. App. 1999)).³

³ The Court of Appeals also noted, “Liberty's delay in demanding arbitration until the litigation was nearly complete not only prejudiced the Hortons but enabled Liberty to "test the water before taking the swim.”” *Id.* at 753-754 (citing *Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 532 N.E.2d 681, 683 (Mass. 1989)).

Rights of Parties / 3rd Parties in Short Term Rentals is an Issue of Public Interest

South Carolina, with its many resort destinations, has numerous short-term rentals. Overall, in 2023, there were approximately 33,419 short-term rental listings in the six largest vacation destinations in South Carolina – Charleston, Columbia, Greenville, Hilton Head, Myrtle Beach and Spartanburg. *See* The Economical Impact of Short-Term Rentals,” Table 1, <https://scca.screaltors.org/wp-content/uploads/2023/04/SCR-STR-Economic-Impact-Study-2023.pdf>.⁴ Occupancy rates are typically between 66-72%. *Id.* Moreover, Airbnb rentals are very rarely occupied by only one person; in fact, “88% of reservations are for 2 to 4 people.” *See* “Airbnb by the Numbers: Usage, Demographics, and Revenue Growth,” Feb. 26, 2024, <https://muchneeded.com/airbnb-statistics/> (last visited March 7, 2024). Despite only one user actually booking the rental, however, Airbnb contends that every occupant of these tens of thousands of short term rentals has agreed to arbitration of any and all claims.⁵

Airbnb is attempting to force arbitration on Plaintiff who did not have an Airbnb account and did not consent to the arbitration provision in Airbnb’s Terms of Service. Faced with similar issues, the Illinois Court of Appeals recently held that a non-signatory plaintiff injured in an Airbnb rental was not subject to arbitration where his friend had booked the rental because the plaintiff did not agree to arbitration and further that he was not subject to arbitration based on equitable estoppel. *Peterson v. Devita*, 2023 Il. App. (1st) 230356, No. 1-23-0356 (Ill. App. Ct. Sept. 22, 2023). Further, forcing arbitration under such circumstances has far reaching

⁴ Myrtle Beach has 9,900 Airbnb listings and Charleston has approximately 5,000 listings on Airbnb. *See* Airbnb, <https://www.airbnb.com/myrtle-beach-sc/stays>; and <https://www.airbnb.com/charleston-sc/stays>

⁵ Plaintiff disputes that Jain agreed to arbitrate. However, the circuit court did not reach this issue because it determined that the Plaintiff was not subject to arbitration on other grounds.

implications beyond short-term rentals to include, for example, Uber and Lyft ride-sharing services. As the Court recently noted in addressing an arbitration provision in a home sales contract, “for every [arbitration agreement] that finds its way to court, there are thousands that exercise an *in terrorem* effect,” and most homebuyers do not challenge the arbitration agreements. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 623, 879 S.E.2d 746, 761 (2022) (citation omitted).

Guidance is Needed on “Waiver” to Prevent Continued Strategic Arbitration Delays

Hearings were held on numerous motions in the circuit court on April 5, 2023. Airbnb lost on almost every point they contended that day, including on all discovery matters. Those losses on motion practice required by Airbnb’s discovery stonewalling resulted in Airbnb being held in contempt on discovery issues in the circuit court. Rather than deal with the mess it created, Airbnb strategically chose to pursue an appeal, knowing it would afford them a guaranteed delay of the circuit court litigation (and court ordered production of documents and information) for months if not years.

Despite having been filed for over two years before Airbnb “chose” to pursue arbitration, Respondent’s litigation against Airbnb was still very early in the discovery process due to numerous discovery disputes. Pursuant to the circuit court’s orders, Airbnb only recently produced a partial response to Respondent’s discovery requests that were originally served a year ago.⁶ The current stay and the pending appeal further prolong the time which Respondent must wait to receive discovery she was entitled to receive in July of 2022. Moreover, as time passes, there is an increased risk of a loss of evidence as witnesses become unavailable and memories

⁶ Because of Airbnb’s failure to comply with the circuit court’s discovery orders, Respondent was forced to file a Motion for a Rule to Show Cause (“RTSC”), which the circuit court granted. The circuit court ordered Airbnb to fully respond to the discovery requests. Airbnb has also appealed from that Order.

fade.

The appeal of the Order denying Airbnb's Motion to Compel Arbitration is without merit and taken to cause further delay. The appeal and the stay pending resolution of the appeal are adversely affecting Respondent's ability to litigate and obtain a resolution of her claims through increased expenses and unwarranted delays. Further, it is reasonably certain that a Petition for Certiorari will be filed by whichever party does not prevail on their position before the Court of Appeals. Accordingly, Respondent requests that the Court grant her motion for certification to prevent further unwarranted delays.

IV. Conclusion

For the foregoing reasons, Respondent requests that the Court grant this motion for certification.

[signatures on next page]

Respectfully submitted,

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April 11, 2024
Columbia, South Carolina

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APPEAL FROM AIKEN COUNTY
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PROOF OF SERVICE

The undersigned hereby certifies that on April 10, 2024, **Respondent Julianne Foster's Motion for Certification under Rule 204(B), SCACR** was served on all counsel of record and the Court of Appeals Clerk of Court via Email as follows:

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April 10, 2024

Columbia, South Carolina

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Via Email-Filing:

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RE: Airbnb Inc. v. Rhett Riviere
Appellate Case No.: 2023-001479
Case No. 2021-CP-02-00889
Our File No.: 00305-001

Dear Ms. Kitchings:

Enclosed for filing is Respondent Julianne Foster's Motion for Certification under Rule 204(B), SCACR and proof of service for same.

Sincerely Yours,



Wesley D. Few

Enclosures

WDF/cgy

CC: All Counsel of Record (*Via Email*)
Client (*Via Email*)