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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number 2023-001506
Civil Action Number 2022-CP-04-02159

Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson, Natalie Mann, Mya Ourada, Braden Terrill, and Aneil Tripathi,

Respondents,

v.

Starbucks Corporation and Melissa Morris,

Appellants.

FINAL REPLY BRIEF OF APPELLANT, MELISSA MORRIS

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I. DID THE TRIAL COURT ERRONEOUSLY DENY APPELLANT'S MOTION TO COMPEL ARBITRATION?

INTRODUCTION AND STATEMENT OF THE CASE

On October 17, 2022, Respondents Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson, Natalie Mann, Mya Ourada, Braden Terrill, and Aneil Tripathi ("Respondents") sued Appellants Starbucks Corporation ("Starbucks") and Melissa Morris ("Morris") in the Court of Common Pleas in Anderson County, South Carolina.[1] Starbucks employed Respondents, and Morris briefly managed the store wherein they worked in Anderson, South Carolina.

In December 2022, Starbucks and Morris timely moved to dismiss the case based on federal labor pre-emption under the National Labor Relations Act ("NLRA"). (Starbucks' Motion to Dismiss; R. 0417-0418) (Morris Motion to Dismiss; R. 0415-0416). The Trial Court denied both Motions on February 15, 2023. (Order Denying Motions to Dismiss; R. 0027-0029).

On December 22, 2022, Starbucks moved to transfer the case to the South Carolina Business Court's Pilot Program under the Program's "catch-all provision" given the complexity of the legal issues involved in this case, and Morris supported and joined in the motion. The Trial Court denied this Motion on March 15, 2023. (Order Denying Motion to Transfer; R. 0025-0026).

On April 7 and June 2, 2023, Starbucks and Morris moved to compel arbitration of the case, as all of the Respondents signed broad arbitration agreements, which required them to arbitrate all workplace disputes, except in limited circumstances not herein applicable. (Motions to Compel Arbitration; R. 0252-0253, 0374-0375). On September 1, 2023, the Court denied the Motions to Compel Arbitration. (Order Denying Motions to Compel Arbitration; R. 0011-0016).

[1] Starbucks is the Appellant in a pending companion appeal on the same legal and factual issues that Morris raised in this appeal.

On September 8 and September 11, 2023, Starbucks and Morris timely moved for reconsideration of the Order denying the Motions to Compel Arbitration. (Motions For Reconsideration; R. 0172-0189).

On September 15, 2023, the Court denied the Motions for Reconsideration. (Order Denying Motions For Reconsideration; R. 0008-0010). On September 22, 2023, Starbucks and Morris timely filed their respective Notices of Appeal, contesting the Trial Court's erroneous denial of the Motions to Compel Arbitration and for Reconsideration.

Starbucks and Morris subsequently filed their Initial Briefs on Appeal, and Morris herein Replies to Respondents' Initial Brief.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION

A. *Morgan* Did Not Eliminate Prejudice As A Factor.

The Trial Court's Order and Respondents, in their Initial Brief, overstated the breadth of *Morgan v. Sundance* for the erroneous proposition that the United States Supreme Court eliminated "prejudice" as a factor when determining whether a party waived its right to arbitrate. 596 U.S. 411, 142 S.Ct. 1708 (2022).

To the contrary, in *Morgan*, the United States Supreme Court simply held that courts cannot create procedural rules favoring or disfavoring arbitration. *Id*. at 1712. The South Carolina Court of Appeals has noted that *Morgan* merely requires that "a court must hold a party to its arbitration contract just as the Court would to any other kind." *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 489 (Ct. App. 2022) (quoting *Morgan*, 142 S.Ct. at 1713)).

Contrary to the Trial Court's Order, *Morgan* did not eliminate prejudice as a factor in the waiver analysis in South Carolina.

Instead, *Morgan* merely held that the "usual **federal** rule of waiver does not include a prejudice requirement," while not precluding state courts from continuing to include prejudice as a factor when analyzing waiver of arbitration under state law, as some state courts continue to do post-*Morgan*. (emphasis added). *See Alarcon Constr. Group v. Santoyo*, No. 05-21-00885-CV, 2022 WL 4923461, *5, fn. 3 (Tex. Ct. App., Oct. 4, 2022) (citing *Morgan* while continuing to apply prejudice as a factor in analyzing waiver of arbitration under Texas state law).

The Texas Court of Appeals recently addressed *Morgan's* limited reach and/or applicability in state court proceedings:

> Though *Morgan* clarified federal law, and Texas has long acknowledged 'the importance of keeping federal and state arbitration law consistent,' we still note that *Perry Homes* included a second ground for requiring prejudice under Texas law. . . . The Supreme Court held, '[u]nder Texas law, ***waiver may not include a prejudice requirement, but estoppel does***.' *Id.* That is, '***prejudice is an element of the normal contract rules***.'. . . ('In cases of waiver by litigation conduct, the precise question is not so much when waiver occurs as when a party can no longer take it back.').
>
> We reiterate that the United States Supreme Court recently rejected any requirement of prejudice as an 'arbitration-specific' federal procedural rule in cases brought in federal court. *See Morgan* . . . . To date, however, ***this requirement remains an open question with regard to state law and procedure***. Regardless of whether *Morgan* governs our analysis, we nevertheless determine that Molina established she suffered prejudice as a result of the Rivas Defendants' substantial invocation of the judicial process up until the eve of trial.

Rivas v. Molina, No. 08-23-00102-cv, 2024 WL 647856, fns. 3, 5 (Tex. Ct. App., Feb. 15, 2024) (continuing to consider prejudice, post-*Morgan*, in determining whether a party waived its right to arbitration, as prejudice is a necessary element of estoppel which is indistinguishable from waiver) (emphasis added) (citing *Perry Homes v. Cull*, 258 S.W.2d 580 (Tex. 2008)).

Just as in Texas, *Morgan's* effect in South Carolina "remains an open question." Moreover, again just as in Texas, estoppel in South Carolina is an element of normal contract rules and

requires a showing of prejudice. *See Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432, 446 (Ct. App. 2003) (estoppel elements include a "prejudicial change in position").

In fact, this Court has acknowledged that the "distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465, 471 (2007); *see also Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384, 388 (1992) ("Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins.").

Accordingly, the Court should continue to consider prejudice in the waiver analysis, as *Morgan* did not eliminate prejudice as a factor in South Carolina. As Starbucks and Morris established in their Final Briefs, they did not waive their right to arbitration, as their short delay in requesting arbitration did not prejudice Respondents.

B. Starbucks And Morris Did Not Waive Their Right To Arbitrate

For the reasons that Starbucks and Morris previously asserted, they did not waive their right to arbitrate. In Respondents' Final Brief, they erroneously contended that "neither Defendant attempts to argue that they should prevail under South Carolina's ordinary waiver principles." (Resp. Final Brief, p. 12).

However, Respondents' contention is misplaced because only the arbitrator, and not a court, could determine the waiver issue. *See, e.g., BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 34-35, 134 S.Ct. 1198 (2014) ("'[C]ourts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.' . . . [and] assume parties 'normally expect a forum-based decisionmaker to decide forum-specific *procedural* gateway matters' . . . includ[ing] claims of 'waiver, delay, or

a like defense to arbitrability.'") (citation omitted).

Moreover, as Morris previously established, *Morgan* does not require a party to plead or prove ordinary waiver principles in the context of arbitration in South Carolina, and Respondents failed to cite any cases to the contrary.

C. The Arbitration Agreement Covered Morris.

The Agreement specifically encompassed Respondents' claims against Morris, as it broadly included all claims between Respondents, Starbucks, and/or "any current or former employee of Starbucks" (which necessarily includes Ms. Morris who Starbucks formerly employed as Respondents' manager). *See Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 877 S.E.2d 486, 491 (Ct. App. 2022) ("Lampo agreed to arbitrate her claim against Neasbitt. While the agreement did not name Neasbitt, it did state that, as used in the agreement, the term 'Amedysys' included reference to and was synonymous with its employees and agents. Because Neasbitt is an employee and agent of Amedisys, the arbitration agreement is directly enforceable by Neasbitt against Lampo.").

Respondents did not counter, or even address, this issue in their Initial Brief, so they have waived it. Starbucks and Morris share the same legal defenses on all of the legal issues that Starbucks raised in its Motion for Reconsideration and its pending appeal on these same issues.

CONCLUSION

The Trial Court erroneously denied Appellant's Motions to Compel Arbitration and for Reconsideration by incorrectly considering and/or ruling upon the merits of Respondents' arguments and by failing to refer this dispute to arbitration in accordance with the plain language of the Arbitration Agreement.

Accordingly, the Court should reverse the Trial Court's erroneous Orders and compel arbitration of this lawsuit.

TURNER, PADGET, GRAHAM & LANEY, P.A.

April 30, 2024

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Appellant's Reply Brief complies with Rule 211(b), SCACR

April 30, 2024

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