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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2024-000489

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212 Motors Holding Group, LLC, 212 Motors Columbia, LLC, 212 Motors Florence, LLC, Team 212 Columbia, LLC, and Team 212 Florence, LLC, Appellants,

v.

Adam Maisano, Respondent.

FINAL REPLY BRIEF

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THE LOWER COURT ERRED BY CONFIRMING AN ARBITRATION AWARD THAT THE ARBITRATOR HAD NO AUTHORITY TO MAKE.

Introduction

This matter arises out of an unambiguous contract denominated as a "Combined Certificate of Action" intended to resolve a dispute between 212 Motors and one of its members, Maisano. The parties agreed that 212 Motors would buy out Maisano at his "Interest Value." To avoid doubt, the contract referenced the definition of "Interest Value" in 212 Motors' operating agreement.

In accordance with the contract, an arbitrator was appointed. The contract limited the arbitrator's authority to selecting an appraiser to determine the "Interest Value" of Maisano's membership interests and apportioning the appraiser's fees and the arbitrator's fee.

The "Interest Value" of Maisano's membership interests was never determined. Nonetheless, Maisano insisted that the arbitrator order 212 Motors to buy out Maisano at a different value. Before doing so, the arbitrator was presented with well-defined, explicit, and clearly applicable controlling law. The arbitrator also reviewed his file to verify the scope of his authority. Nonetheless, the arbitrator declined to apply the law presented to him and exceeded the scope of his authority when he ordered the parties to close on the buyout at a different value.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting *Mcgill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* at 615, 732 S.E.2d at 628 (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574).

"Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Company, Inc.*, 356 S.C. 202, 206, 588 S.E.2d 136 (2003) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, at 596-97, 553 S.E.2d 110 (2001). Arbitration rests on consent of the parties, where parties freely exchange the expansive litigation rights court actions provide for the speed, informality, and finality arbitration promises. But when parties calculate the benefits and risks of their exchange, they do not bargain to have their dispute resolved by whim. *Waldo v. Cousins*, Op. No. 28201 (S.C. Sup. Ct. filed May 1, 2024) (Howard Adv. Sh. No. 16).

Argument

Notwithstanding Maisano's insistence on including his entire file in the record on appeal and his attempt to conflate the obligation of *the members* with the obligation of 212 Motors,[1] what Maisano desires to make complicated is quite simple. The record on appeal should have been limited to the two-page contract, paragraph 8.3 on page 6 of the Operating Agreement, three sentences on page 8 of the supplemental valuation report of Maisano's appraiser, WithumSmith+Brown ("Withum"), and a one-page email/award from the arbitrator. Even the arbitrator determined that "the empirical 'evidence' consists of the Withum reports and the Operating Agreement." (R. p. 18).

212 Motors, *not its members*, is obligated to buy Maisano's interest in 212 Motors, a used car lot formerly operating in Cayce, South Carolina, at "Interest Value", a defined term in its Operating Agreement. "Interest Value" is *not fair value, fair market value, book value, intrinsic*

[1] See Maisano's motion for rule to show cause seeking to hold persons who are not parties to this action in contempt.

value, loan value, retail value, wholesale value or any other measure of value. (R. p. 94).[2] Maisano agrees with this assertion following a reference to the definition of "Interest Value" in his brief. ("Once the Appraiser valued *that interest*, according to the CCA, the parties were to "accept the valuations determined by the appraiser as definitive and binding.") (Respondent's brief at 11).

In an effort to obscure 212 Motors' obligation to buy Maisano's interest at "Interest Value," Maisano focuses solely on the phrase "definitive and binding." In fact, he repeats it nineteen (19) times in his brief. Repetition in an argument does not alter basic contract law.

"We are bound to interpret the agreement by looking at the entire agreement from beginning to end: precedent explains that when construing a contract, 'all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity' . . . we read agreements in a way that 'will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Herrington v. SSC Seneca Operating Company, LLC*, 435 S.C. 243, 866 S.E.2d 579 (Ct. App. 2021).

To date, the "Interest Value" of Maisano's membership interests has not been determined. (R. p. 318). Withum admitted on page 8 of their revised report that the debts of 212 Motors, one of the elements to be considered in a determination of "Interest Value" under Section 8.3 of the Operating Agreement, was "beyond the scope of [their] determination of *fair market value*." (R. p. 256).

Nonetheless, the arbitrator, whose authority was limited by the parties to selecting an appraiser to determine "Interest Value" and apportioning the fees of the arbitrator and the

[2] "Interest Value," fair value, and fair market value according to Revenue Ruling 59-60, are not the same. (R. pp. 317-318).

appraiser, directed 212 Motors and Maisano to proceed with closing on the buyout at a different value, determined by Withum at a cost of $15,000 to 212 Motors. The arbitrator had no authority to direct the parties to do anything.[3] Thus, by ordering the parties to proceed with a closing, the arbitrator exceeded his authority.

Likewise, the lower court either misunderstood or ignored the contract and ordered that 212 Motors and Maisano proceed with a closing on the purchase at a value other than "Interest Value."

THE CONTRACT

While the parties disagree as to the meaning of their agreement, and Maisano, the arbitrator, and the lower court ignore the first page of the contract altogether, 212 Motors and Maisano nonetheless agree that they entered into the contract. It provides in its entirety:

Action in Lieu of a Meeting or Special Meeting

RESOLVED, the Undersigned Members unanimously agree this action is being taken in lieu of a regular or special meeting of the Undersigned Members, and each waives any requirements for an actual meeting to be held.

WHEREAS, the Undersigned Members agree that the membership interests of member Adam Maisano ("Maisano") will be purchased by the Company at their "Interest Value," **as that term is defined in Section 8.3** in each operating agreement executed for the above-mentioned companies (collectively, "the Operating Agreement").

[3] Maisano insisted that the lower court impose sanctions against members of 212 Motors who were not parties and makes baseless and unfounded claims of ethical misconduct while flouting his duty of candor.

WHEREAS, the Undersigned Members agree that while Section 8.3 of the Operating Agreement provides a method for determining the Interest Value of a member's membership interests in the event that the offering member and the Company are able to agree upon a neutral appraiser, the Operating Agreement fails to provide a method for determining the Interest Value of a member's membership interests when the offering member and the Company are unable to agree upon a neutral appraiser.

WHEREAS, Maisano and the Company are unable to agree on a neutral appraiser to determine the Interest Value of Maisano's membership interests.

WHEREAS, in order to proceed with the valuation and sale of Maisano's membership interests in a fair and expeditious manner, the undersigned Members now agree to amend the valuation and purchase procedures contained within the Operating Agreement.

RESOLVED, the valuation and purchase procedures contained within the Operating Agreement are amended as follows:

I. The undersigned Members agree to submit the selection of an appraiser to arbitration;

II. The undersigned Members agree that this arbitration will be conducted by a single arbitrator rather than a panel of three arbitrators as is required by Section 12.14 of the Operating Agreement;

III. The undersigned Members agree that John E. Cuttino, Esq. will serve as the arbitrator;

IV. The undersigned Members agree that the arbitrator will determine who will pay the arbitrator's fees;

V. The undersigned Members agree that the arbitrator's choice of appraiser will be definitive;

VI. The undersigned Members agree that the cost of the appraiser will be split between Maisano and the Company, with the split determined by the arbitrator;

VII. The undersigned Members agree that they will cooperate with the requests of the appraiser, including, but not limited to, by providing access to all governing documents, books, accounts, and records that the appraiser may deem relevant to the preparation of his report;

VIII. The undersigned Members agree that the appraiser will value the Company and **the Interest Value** of Maisano's interests in the Company as of December 31, 2022;

IX. The undersigned Members agree that they will accept the valuations determined by the appraiser as definitive and binding;

X. The undersigned Members agree that no later than 30 days following the appraiser's determination of **the Interest Value** of Maisano's membership interests, the purchase of Maisano's membership interests by the Company will take place at a closing pursuant to Section 8.5 of the operating agreements;

XI. The undersigned Members agree that upon closing, the Company will execute and file a members [sic] statement of dissociation with the Secretary of State of South Carolina. Maisano agrees to cooperate in transferring all remaining authority he possesses on behalf of the Company, including any administration and authorized contact rights he has been granted with regards to any third parties.

(R. p. 142).

(emphasis added).

"Interest Value" is defined in Section 8.3 on page 6 of the Operating Agreement as:

> equal to the fair market value of the Offered Interest, as determined by appraisers selected as provided in this Section 8.3 and considering the fair market value of the LLC's assets, less an imputed sales commission equal to seven percent (7%) of the fair market value of the LLC's assets; the amount of LLC liabilities; the percentage of ownership represented by that Offered Interest; and the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to the LLC.

(R. p. 94).

THE ARBITRATOR'S LIMITED AUTHORITY

In accordance with Sections III, IV, V, and VI of the contract, an arbitrator was appointed to select an appraiser to determine Maisano's "Interest Value" in accordance with Section 8.3 of the Operating Agreement and to apportion the fees of the appraiser and the fees of the arbitrator. The arbitrator acknowledged the limitations on his authority.

> Pursuant to the Combined Certificate of Action dated June 6, 2023, the following is my decision on the items I am asked to rule on:
>
> 1. Appraiser will be Stuart McCallum of Withum Company. My expectation is that he personally, and his team will perform this work. If that is not correct, please notify me asap.
>
> 4) Arbitrator fees will be paid by the "Company" as

defined in the Combined Certificate.

6) Cost of the appraiser will be paid by the "Company" as defined in the Combined Certificate.

(R. p. 144).

WITHUM'S ATTEMPTS TO GAME THE SYSTEM

On its first attempt, Withum provided *Fair Value* ("FV") rather than *Interest Value*. (R. p. 149). Withum admitted that they did not find a sufficient number of comparable transactions in the databases they typically research to determine valuation predicated upon the Market Approach. (R. p. 169). As explained in their cover letter,

> We performed this valuation engagement and present our detailed report in conformity with the "Statement of Standards for Valuation Services No. 1 (SSVS) of the American Institute of Certified Public Accountants. SSVS defines a valuation engagement as,
>
> > . . . an engagement to estimate value in which a valuation analyst determines an estimate of the value of a subject interest by performing appropriate procedures, as outlined in the AICPA Statement of Standards for Valuation Services and **is free to apply the valuation approaches and methods he or she deems appropriate in the circumstances**.

(emphasis added).

In other words, Withum ignored Section 8.3 of the Operating Agreement.

The report contains 94 pages of unnecessary minutia completely unrelated to "Interest Value" and boilerplate typically found in appraisals but lists the operating agreement on page 35 as one of the documents reviewed. The definition of "Interest Value" appears in Section 8.3 of the Operating Agreement.

According to page 4 of their report,

> Pursuant to our engagement in this matter, we developed and express a conclusion as to **the Fair Value** of a 100% common equity interest in 212

> Motors Florence and 212 Motors Columbia **on a controlling, marketable basis** as [sic] December 31, 2022.
>
> * * *
>
> **The standard of value used for our analysis was Fair Value. Fair Value is a legally created standard of value that lacks a clear and concise definition** and is generally used in dissenting and oppressed shareholder disputes . . .

(emphasis added).

When challenged on its failure to determine the "Interest Value", Withum responded:

> 5). The shareholder agreement calls for a valuation at a fair market value standard but **Withum's valuation was done on a fair value basis**. Additionally, the operating agreement calls for an imputed sales discount of 7%.
>
> **We did not value the company based on the shareholder agreement** nor did counsel instruct us to value the company based on the shareholder agreement. It is our understanding that the standard of value for shareholder disputes in South Carolina is fair value.

(R. p. 246, par. 5) (emphasis added).

Thereafter, Withum provided a supplemental report. (R. p. 249). This time, Withum acknowledged:

> **Counsel has asked us to determine the fair market value** ("FMV") of Adam Maisano's 33.33% interest (the "Subject Interest") in 212 Motors Holding Group LLC ("212 Motors") as of December 31, 2022 (the Valuation Date) **in accordance with section 8.3** of the 212 Motors Holding Group Operating Agreement (the "Operating Agreement").

(R. p. 249) (emphasis added).

Withum then proceeded to determine *Fair Market Value* in accordance with Revenue Ruling 59-60 rather than in accordance with Section 8.3 of the Operating Agreement. (R. p. 249). Again, Withum provided 78 pages of minutia unrelated to "Interest Value" and more of the same boilerplate. Incredibly, Withum stated on page 8:

> **Columbia has total debt of $1,554,070** as of the Valuation Date. It is our

> understanding that this is a loan for working capital purposes, and Mr. Maisano is a co-signer for this loan. **We offer no opinion how this loan would factor into the Agreement Price as it falls outside the scope of our determination of fair market value.**
> (R. p. 256).

(emphasis added).

Notwithstanding Withum's acknowledgement that it had been asked to determine the fair market value in accordance with Section 8.3, in which "Interest Value" required a deduction for an imputed sales commission equal to seven percent (7%) of the fair market value of the LLC's assets; the amount of LLC liabilities; the percentage of ownership represented by that Offered Interest; and the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to the LLC, Withum chose to ignore the 7% deduction, $1,554,070 in LLC liabilities and Maisano's debt obligations to the LLC set forth in the complaint. (R. p. 256).

Who in their right mind would pay $189,000 for a 33.33% interest in a declining business in a mature industry with total equity of only $746,000 and debt of $1,554,070? This would be akin to a spouse taking his or her one-third of the proceeds from the sale of a marital home without any contribution towards satisfaction of the mortgage!

Beginning on January 16, 2024, Maisano began asking the arbitrator to issue an order requiring 212 Motors to schedule a closing. (R. p. 568). Initially, the arbitrator declined but suggested that a closing take place on Monday, January 22.

Subsequently, the arbitrator notified the parties that he had looked back through his file to verify his scope of authority and was inclined to issue an order requiring that the closing be conducted no later than 6:00 pm Eastern Time on Thursday, February 1, 2024. The arbitrator invited comment by counsel for the parties and both parties confirmed their positions. 212

Motors cited well-defined, explicit, and clearly applicable controlling law in support of its position. (R. p. 572).

Having been presented with well-defined, explicit, and clearly applicable law, and having verified his scope of authority, the arbitrator clearly refused to apply the law and exceeded the scope of his authority. The lower court then erred by confirming the arbitrator's award exceeding the scope of his authority.

Conclusion

Based upon the foregoing, the lower court should be reversed. This matter should be remanded to determine Maisano's "Interest Value," if any, in 212 Motors and judgment should be entered accordingly as any other money judgment.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

September 11, 2024

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