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Oct 10 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 similiary situated, Respondents,

v.

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

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Rules of Appellate Procedure, Appellants Pacifica Skylyn, LLC, d/b/a/ Pacifica Senior Living Skylyn, and Matthew Arledge (collectively "Pacifica") respectfully request rehearing regarding this Court's September 25, 2024, Opinion affirming the circuit court's denial of Pacifica's Motion to Compel Arbitration in this case.

Pacifica's appeal was premised on an important and novel issue of contract interpretation in South Carolina – whether a party may supply a missing term to a contract and, if so, the evidentiary standard a party must satisfy to do so. The circuit court neglected to rule on the legal question raised by Pacifica in its initial Order or in response to a focused Motion to Reconsider

highlighting the issue of law. Likewise, the Court’s Opinion does not address the key legal question posed by Pacifica or cite any case law addressing the issue. Pacifica respectfully submits the Court overlooked or misapprehended two important points in this case, discussed below, and asks the Court to grant rehearing in this case.

ARGUMENT

The scenario giving rise to the issue before the Court is neither incredible nor uncommon. The Villanova’s and Pacifica had a contractual relationship. When this dispute arose, reference to the parties’ agreement was the natural and proper initial step in responding to the dispute. Pacifica located the agreement, but certain pages were missing. Pacifica produced the page of the Agreement wherein Respondent’s attorney in fact signed an acknowledgment that she understood the significance and importance of the arbitration provision. But Pacifica could not locate the page containing other terms of the arbitration provision.

The unanswered legal question here is what happens when a party loses a page (or portion of a page) within a contract but presents undisputed evidence of the contractual terms contained in the missing page. Put another way, can a filing mistake invalidate a binding contractual obligation where all other elements of contract are met, and the terms are objectively proven? Pacifica submits that neither the trial court nor this Court has answered this question.

1. The Court misapprehended or overlooked Pacifica’s undisputed evidence proving the Agreement’s missing terms through an objective method.

By analogy to South Carolina case law and citation to out-of-state case law addressing this exact issue, Pacifica argued that missing terms in a contract could be supplied if there was an objective method for doing so. This Court’s Opinion does not address this point or cite any case law addressing this point. In affirming the trial court, this Court overlooked the uncontroverted evidence of the “missing terms” that Pacifica submitted in support of the Motion to Compel

Arbitration. Pacifica submitted an affidavit from Debra Kimbrell, the Business Office Director for Pacifica, testifying to the language of the full arbitration provision included in Respondent's Residence and Services Agreement ("the Agreement"), including examples of other agreements entered into during the same time frame with identical language. (R. 62-63). Respondent has not challenged the substance or admissibility of Ms. Kimbrell's affidavit testimony at any point in this litigation and has presented no authority suggesting the Court could not properly consider such evidence to supply the missing terms of the arbitration provision.¹ Ms. Kimbrell's affidavit testimony presents an objective method of clarifying the ambiguity created by a missing page in the Agreement. *See, e.g., Columbia E. Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520, 386 S.E.2d 259, 261 (Ct. App. 1989) (explaining that "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"); *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (1991) ("[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.") (citing 1 Williston, Contracts § 46, at 152–153 (3d ed.)). Accordingly, Pacifica submits this Court should grant rehearing and reverse the circuit court's denial of Pacifica's Motion to Compel Arbitration based on the undisputed evidence of the terms of the Agreement's arbitration provision.

2. The Court misapprehended or overlooked the fact that Respondents' attorney in fact signed a binding arbitration agreement.

The Court also misapprehended the importance of the portions of the Agreement that Pacifica did produce. Pacifica produced a portion of the arbitration provision wherein

¹ Importantly, Respondent has not presented any generally applicable contract defenses to the arbitration provision as supplied by Ms. Kimbrell's affidavit or challenged his attorney in fact's capacity to enter such an agreement.

Respondents' attorney in fact acknowledged understanding the significance of the arbitration provision included in the Agreement. (R. 68). *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("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."). In other words, the Respondent's attorney in fact signed the Arbitration Agreement. (*Id.*). Pacifica submits the Court overlooked or misapprehended this point in concluding, "Appellants have not met their burden of proof regarding whether there was a valid Arbitration Agreement." The dispositive question is not whether Respondent's Agreement included an arbitration provision, but whether the provision encompasses Respondent's claims here. Pacifica submits that Ms. Kimbrell's unchallenged affidavit testimony is sufficient for this Court to conclude that Pacifica has met its burden of proof in establishing that Respondent's claims are subject to mandatory arbitration.

CONCLUSION

The Court should grant rehearing and reverse the circuit court's Order denying Pacifica's Motion to Compel Arbitration based on the arguments herein. Pacifica also incorporates into this petition all the arguments it raised in briefing to this Court and does not abandon such arguments.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the Appellants' Petition for Rehearing in the above-captioned case has been served on the following parties via e-mail, on October 10, 2024:

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