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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Commons Pleas

Michael S. Holt, Presiding Judge

Appellate Case No. 2024-000338

Joshua Phillips, ... Respondent,

v.

Renu Energy Solutions, LLC,.....Appellant.

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

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I. THE ARBITRATION PROVISION IS NOT UNCONSCIONABLE.

A. MR. PHILLIPS RETAINED A MEANINGFUL CHOICE.

Phillips argues the current dispute is under "nearly identical circumstances" as the consumer in *Simpson* because the arbitration provision appears in paragraph six of eighteen and Phillips was subject to "high pressure" sales tactics. (Resp't Br. p. 5). The *Simpson* court found that Simpson did not retain a meaningful choice in agreeing to arbitrate for several reasons. Explicitly noting that the agreement "required Simpson to forego certain remedies otherwise required by statute" and limited their holding "in the context of an adhesion contract for a vehicle trade-in." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007).

Here, the arbitration provision limits no remedies or legal rights of Phillips. Further, Phillips was presented the contract for signature virtually, away from any alleged "high-pressure sales tactics." The arbitration agreement was not inconspicuous as required to demonstrate the absence of meaningful choice. Phillips signed the agreement on his own, including his initials appearing directly below the arbitration provision. Therefore, Phillips has failed to demonstrate an absence of meaningful choice for unconscionability.

B. THE ARBITRATION PROVISION CONTAINS NO OPPRESSIVE OR ONE-SIDED TERMS.

i. Excessive Fees and Costs

Phillips argues the trial court made a factual determination that the AAA Construction Rules apply to this dispute. Under the Supreme Court's decision in *Green Tree*, invalidating an arbitration agreement based on excessive fees and costs requires a legal determination that the party resisting arbitration has carried their burden in demonstrating prohibitive costs. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). The trial court found that

applying the Construction Rules would impose costs exceeding those expected in litigation. (R. p. 6).

The trial court's decision to apply the AAA Construction Rules has no support. First, the Plaintiff never filed for arbitration, so any decision on what rules would apply is speculative. Second, the arbitration clause does not specify AAA Construction Rules. It merely indicates arbitration with the AAA. Third, the AAA Consumer Rules apply to disputes regarding consumer sales. (*See,* AAA Consumer Rules R-1(c)). Finally, Plaintiff counsel has another case with the redundant arbitration clause that is being arbitrated under the consumer rules. *See, Michael Alexander v. Renu Energy Solutions, LLC, Goldman Sachs Bank USA, and GreenSky, LLC,* C/A No. 2023-CP-43-00121.

Phillips argues he will incur unreasonable and prohibitive costs if both parties proceed with arbitration because the proceeding will be under the AAA Construction Rules. (Initial Brief of Respondent, ¶ 10). However, the contract does not specify that the arbitration will be governed under the AAA Construction Rules. The clause only indicates that the proceeding will be governed by AAA rules. (R. pp. 302-303, ¶ 6).

Allowing Phillips to assume the most expensive possible scenario to invalidate an arbitration agreement that specifies no particular costs sets a precedent inconsistent with arbitration policy. Further, this line of speculation has been explicitly foreclosed by the Supreme Court in *Green Tree*.

ii. Non-mutual Arbitration is Permissible to Mitigate Business Risk

Phillips argues that non-mutual provisions of the arbitration agreement coupled with alleged prohibitive costs renders the agreement unconscionable. The agreement excepts "suits or claims for money owed by Purchaser under this Agreement" and "suits or claims which deal with

repossession of equipment and parts subject to this Agreement." When an arbitration clause reserves judicial remedies for protecting the collateral by enforcement procedures specified by law (*e.g.*, replevin or foreclosure), the lack of mutuality is permissible if it bears a "reasonable relationship to the business risks inherent in secured transactions." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672.

Here, the provision excepting Renu from bringing suits of repossession or failure to make payments is expressly related to the business risk of the transaction. Therefore, under *Simpson*, the non-mutual provisions cannot render the agreement invalid absent a finding of prohibitive costs.

iii. Venue Provision is not Unconscionable

Under § 15-7-120(B) of the South Carolina Code, a venue provision requiring arbitration outside South Carolina is unenforceable. S.C. Code. Ann. § 15-7-120(B). The statute requires that the remaining provisions in the arbitration agreement stay intact and must adhere to the Federal Arbitration Act and "applicable rules of arbitration." *Id.*

Here, the venue provision requiring arbitration in Charlotte, North Carolina is removed by Section 15-7-120(B), it does not invalidate the arbitration agreement. Phillips argues the venue provision is unconscionable and that this alone is sufficient to prove that the arbitration clause is unconscionable and unenforceable. (Initial Brief of Respondent, ¶ 9-10). The statute allows the remaining provisions of this agreement to stay intact, and the agreement remains enforceable. Phillips provided no evidence to demonstrate the venue provision will result in unreasonable and prohibitively expensive arbitration costs.

Therefore, the trial court erred in concluding that the arbitration clause is unconscionable based on the venue selection provision.

II. ANY UNENFORCEABLE PROVISIONS SHOULD BE SEVERED.

The court has the power to sever unenforceable provisions of an arbitration clause while keeping the remaining provisions intact. *Huskins v. Mungo Homes, LLC,* 439 S.C. 356, 371, 887 S.E.2d 534, 542 (Ct. App. 2022).

In this case, there is not a "multitude of one-sided terms" in the arbitration clause between Renu and Phillips. Unlike the arbitration clause in *Damico v. Lennar Carolinas, LLC,* 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020) which contained restrictive provisions, this arbitration clause will only have the venue provision removed due to § 15-7-120(B) for arbitrating outside of South Carolina. This clause does not limit any of Phillips' legal remedies and does not contain any restrictive provisions. Instead, it specifies the types of disputes that are subject to arbitration and provides the parties with options for selecting an arbitrator. (R. pp. 302-303, ¶ 6). It also provides exceptions that allow disputes to be conducted outside of arbitration if conditions are met. (*Id.*) Therefore, this Court should reverse the lower court's refusal to sever the arbitration clause.

III. PHILLIPS FAILED TO DEMONSTRATE WAIVER.

Phillips argues that Renu waived its right to compel arbitration based on a single request to admit filed concurrently with its Answer and Motion to Compel Arbitration. The request to admit stated, "Please admit that the amount sought in full recovery in this matter is less than $75,000." (R. p. 186). This Court has previously recognized three factors to consider when determining whether a party has waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in **extensive discovery** before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Davis v. KB Home of S.C., Inc., 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011) (emphasis added).

This Court ruled that an eight-month litigation period consisting of general interrogatories, requests to admit, and without depositions is insufficient to establish waiver. *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.,* 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001).

There is no authority that one request to admit filed with an answer and motion to compel arbitration waives the right to arbitration.[1] Further, Phillips is required to specify damages in arbitration. Renu filed a single Request to Admit with its Answer and Motion to Compel Arbitration. Renu's participation in this litigation falls substantially below any case where waiver was found. Therefore, even ignoring the required showing of prejudice under current South Carolina precedent, Phillips still fails to carry his burden of demonstrating waiver.

CONCLUSION

The arbitration agreement is a standard provision specifying the American Arbitration Association's rules shall apply in the event the parties cannot come to a mutual agreement. The trial court speculated that the most expensive possible scenario would occur despite the clear language of the AAA Consumer Rules, to invalidate the agreement as unconscionable. The provision limits no legal rights or remedies of the consumer and contains no unconscionable terms.

[1] Phillips relies on a series of cases finding waiver when a party engages in extensive discovery after filing their answer. *See, Davis v. KB Homes of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (finding waiver after KB Home filed multiple sets of interrogatories and requests for production of documents, both parties responded and produced discovery, and Plaintiff's deposition was noticed and rescheduled five separate times); *Tech. in P'ship, Inc. v. Rudin*, 538 Fed. Appx. 38 (2d Cir. 2013) (finding waiver after TIP had to defend two substantive motions to dismiss, then produce its witness for deposition, comply with an extensive document request, and participate in extended discovery disputes with the Rudins); *Garcia v. Wachovia Corp.*, 699 F.3d 1273 (11th Cir. 2012) (finding waiver after "For more than a year, the parties prepared their cases for trial. They engaged in extensive discovery: they served and answered interrogatories, produced approximately 900,000 pages of discovery documents, and took approximately 20 depositions. The parties also litigated several motions before the district court.")

For the foregoing reasons, Renu asks this Court to reverse the trial court's findings that the arbitration agreement was unconscionable, the venue provision was not severable, and that Appellant had waived its right to compel arbitration. And Renu asks that this court find the arbitration clause enforceable by directing the Respondent to file for arbitration under the AAA Consumer Rules.

Respectfully submitted,

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