

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

C.A. No.: 2021-CP-02-01306

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Oct 30 2024

S.C. SUPREME COURT

Regions Bank, an Alabama banking corporationRespondent,

v.

CDIC Development Company, LLC, a South Carolina limited liability companyPetitioner.

RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Given the parties' agreement that "[j]udgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction," did the circuit court and the court of appeals correctly apply South Carolina law in confirming an arbitration award and directing the entry of judgment?

INTRODUCTION

CDIC Development Company, LLC ("CDIC") has spent years dodging its obligation to repay Regions Bank on a 2008 Business Line Agreement (the "Note"). This Petition marks yet another effort to avoid payment.

The Note provides that "[t]he Federal Arbitration Act ["FAA"] applies to the construction, interpretation, and enforcement **of this arbitration provision.**" (R. at 27 (emphasis added)). The Note also states, "[j]udgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction." (*Id.*). The parties arbitrated their dispute as agreed, and Regions Bank seeks to enforce that award in the courts of this state also as agreed. CDIC ignores the portion of the Note relating to entry of judgment and looks exclusively to the provision relating to construction, interpretation, and enforcement of the arbitration provision.

The court of appeals considered the language of the parties' agreement as a whole, including the specific language addressing the entry of judgment on the arbitrator's decision, and applied settled South Carolina law. Based on that review and analysis, the court dispensed with oral argument and affirmed the circuit court's order confirming the arbitration award pursuant to Rule 220, SCACR in an unpublished *per curiam* opinion.

Contrary to the gloss applied by CDIC in its Petition, this case does not implicate any of the factors listed in Rule 242, SCACR: there are no novel questions of law, there was not a dissent in the decision of the court of appeals, the decision of the court of appeals does not conflict with any prior decision of this Court, there is no constitutional question in play, and there is no conflict

between the decision of the court of appeals and United States Supreme Court precedent. Therefore, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE AND FACTS

Regions Bank loaned CDIC \$250,000 on January 10, 2008 pursuant to a Business Line Agreement (the “Note”). (R. at 22 ¶3, 25-27). CDIC defaulted on the Note. (R. at 23 ¶¶4-5).

Following the default by CDIC, the dispute between Regions Bank and CDIC was submitted to arbitration as required by the Note. (R. at 23 ¶7). On June 27, 2019, the arbitrator approved a Joint Stipulation and issued a written award to Regions Bank in the amount of \$220,309.81 as of June 21, 2019, which also included interest at the per diem rate \$28.18 accruing thereafter (“Award”). (R. at 28-29). CDIC has not challenged the underlying Award.

Regions Bank filed a petition with the Aiken County Court of Common Pleas to confirm the Award on June 22, 2021. (R. at 22-29). CDIC filed a motion to dismiss on September 7, 2021, arguing the petition was time-barred pursuant to a provision found within the Federal Arbitration Act (“FAA”), 9 U.S.C.A. § 9. (R. at 31-35). The circuit court confirmed the Award on September 27, 2021. (R. at 1-7). CDIC sought reconsideration on September 28, 2021, which was granted by order dated November 11, 2021. (R. at 36-38, 8-10). The circuit court then heard CDIC’s pending motion to dismiss on January 31, 2022 and issued an order denying the motion to dismiss, confirming the Award, and directing the entry of judgment on April 12, 2022. (R. at 11-21).

CDIC appealed. The court of appeals dispensed with oral argument and affirmed the circuit court in an unpublished opinion filed on May 1, 2024, finding that the South Carolina Uniform Arbitration Act (“Act”) applied to the procedure for the confirmation of the Award and that the Act does not include a statute of limitations absent a motion to vacate, modify, or correct. CDIC filed a petition for rehearing on May 31, 2024, arguing once again that the FAA applied to the

enforcement of the Award even in South Carolina state courts. The court of appeals denied the petition by order dated August 13, 2024.

CDIC does not dispute the amount of the underlying Award. (R. at 28-29). Nor does it dispute the “the construction, interpretation, and enforcement of this arbitration provision” as decided in the arbitration. Instead, it contends it should not pay anything based on when Regions Bank sought to enforce the Award in the circuit court.

STANDARD OF REVIEW

This Court “may make its own ruling on a question of law without deferring to the circuit court.” *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 748 S.E.2d 221, 224 (2013) (affirming trial court’s confirmation of an arbitration award as a matter of South Carolina law). In addition, construction of an unambiguous contract is a matter of law for the Court to the extent this appeal requires the Court to construe the arbitration provision of the Note. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996).

ARGUMENT¹

CDIC argues that the FAA applies to any possible matter regarding arbitration in this case, including the confirmation of the Award. That is not what the parties agreed. Instead, the parties agreed that the FAA applies “to the construction, interpretation, and enforcement of this arbitration provision.”

With respect to any award, the parties agreed that judgment “may be entered in any court having jurisdiction.” Nothing in the Note states that the FAA will apply to the entry of an arbitration award, and CDIC has not argued that the courts of this state lack jurisdiction.

¹ Regions Bank incorporates its Respondent’s Brief by reference.

Neither the court of appeals nor the circuit court overlooked or failed to enforce any portion of the parties' agreement. This is not a dispute relating to the arbitration provision. It is an action to confirm the Award in a court having jurisdiction. Accordingly, both the circuit court and the court of appeals honored the parties' agreement with respect to the entry of the Award.

State law, not the FAA, applies when confirming an arbitration award in South Carolina state courts. *Henderson*, 405 S.C. at 448, 748 S.E.2d at 225. Hoping to avoid this result, CDIC argues that *Henderson* should be limited to its own facts and is not applicable here. Nothing about the face of the *Henderson* opinion suggests that it is to be so narrowly construed. This is because "the FAA does not preempt state *procedural* law relating to arbitration." *Id.* As set forth in *Henderson*, "[t]he FAA's substantive provisions apply to arbitration in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA." *Id.* at 450, 748 S.E.2d at 226-27. Confirmation of an arbitration award is procedural, not substantive. *Id.* As such, "section 9 of the FAA applies only in federal court[.]" *Id.*

Given this express holding and the language of the parties' agreement, the circuit court and the court of appeals correctly applied state law and confirmed the award pursuant to S.C. Code Ann. § 15-48-120, which provides as follows:

Upon application of a party, **the court shall confirm an award**, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15-48-130 and 15-48-140.

(Emphasis added). As found by the court of appeals, there is not a limitations period for confirmation of an award under the Act in the absence of a request to vacate, modify, or correct the underlying award.

Nothing about the language of the Note changes this result. In *Henderson*, the parties agreed that any disputes would be submitted to binding arbitration that "shall be governed by the

[FAA].” 405 S.C. at 445, 748 S.E.2d at 223. Even given that language, which is broader than the language here, which is limited to “to the construction, interpretation, and enforcement of this arbitration provision,” this Court found that state law applied to the confirmation process and that 9 U.S.C.A. § 9 did not apply. There is no reason why the same would not be true in this case as found by the court of appeals.

Based on the plain language of the parties’ agreement and the holding in *Henderson*, there is no reason to consider whether the outcome would be different under the FAA, and the court of appeals did not rule on this issue. The circuit court, however, included an alternate sustaining ground that the result would not be different under the FAA, citing *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993). As found by the Fourth Circuit, 9 U.S.C.A. § 9 is permissive and does not act as a time-bar for confirmation of arbitration awards. *See id.*; *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 192 (4th Cir. 1998); *Real Color Displays, Inc. v. Universal Applied Techs. Corp.*, 165 F.3d 19 (Table), 1998 WL 764711, at *3 (4th Cir. Oct. 30, 1998); *United Gov’t Sec. Officers of Am. v. Special Operations Grp., Inc.*, 436 F. Supp. 2d 790, 794 (E.D. Va. 2006); *Cyber Imaging Sys., Inc. v. Eyclation Inc.*, No. 5:14-CV-901-BO, 2015 WL 2152872, at *2 (E.D.N.C. May 7, 2015).

Sverdrup Corp. has not been reconsidered by the Fourth Circuit, nor has it been overruled by the United States Supreme Court. CDIC’s citation to *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) as in conflict with *Sverdrup Corp.* is misplaced as explained in *United Gov’t Sec. Officers of Am.* at 794–95. As stated there,

[Defendant], refusing to strike its colors, argues that *Sverdrup* is of limited precedential value in light of the Supreme Court’s subsequent decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000). Yet this argument, too, is not persuasive, as the *Cortez* analysis focuses almost exclusively on the FAA’s venue provisions and their legislative history, not on § 9’s one-year time period. *Id.* at 199, 120 S.Ct. 1331. The Supreme Court in *Cortez* did not analyze any FAA provisions dealing

with statutes of limitations. [Defendant] also cites *Photopaint Technologies, LLC v. Smartlens Corp.* [335 F.3d 152 (2nd Cir. 2003)], where the Second Circuit, contrary to *Sverdrup*, construed § 9 as establishing a one-year statute of limitations. Although the Second Circuit's reasoning in *Photopaint* is sound, indeed compelling, **Sverdrup remains controlling precedent in this circuit and district courts are not at liberty to reach a different result. In short, § 9's one-year period is not, in this circuit, a statute of limitations and hence § 9 cannot be used in preference to West Virginia law.**

(Emphasis added). The *Cortez* decision is clearly distinguishable because it did not analyze the FAA provisions dealing with a statute of limitations for confirming awards.

Based on the above, the result would not be different in the Fourth Circuit than in South Carolina because 9 U.S.C.A. § 9 is permissive and does not bar claims after one year. For this reason, the circuit court did not err in citing *Sverdrup Corp.* as an additional basis for its ruling.

CONCLUSION

This case does not trigger any of the factors listed in Rule 242, SCACR that would support granting the Petition. As such, the Petition should be denied.

Respectfully submitted,

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