RECEIVED
Nov 08 2024
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF AIKEN
SECOND JUDICIAL CIRCUIT

Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2022-000546
Circuit Court Case No. 2021-CP-02-1306

REGIONS BANK.....Respondent,

v.

CDIC DEVELOPMENT COMPANY, LLC.....Petitioner.

PETITIONER'S REPLY BRIEF

Ian S. Ford (S.C. Bar 12463)
Ian.Ford@FordWallace.com
Ainsley F. Tillman (S.C. Bar 70551)
Ainsley.Tillman@FordWallace.com
FORD WALLACE THOMSON LLC
715 King St.
Charleston, South Carolina 29403
843-277-2011
www.FordWallace.com

Attorneys for Petitioner CDIC Development Company, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN REPLY

This case has the potential for broad applicability in South Carolina. At issue is whether a bank can change the law that it wishes to apply—despite the express terms of the contract that the bank drafted—based solely on the bank's pleasure at a particular moment in a contractual relationship. For the lifetime of the relationship of the parties, Regions Bank has taken the position that the arbitration clause within its Note, which includes a choice-of-law provision naming the Federal Arbitration Act as applicable, is binding. Regions Bank drafted the arbitration agreement, selected the Federal Arbitration Act as controlling, and enforced the clause against CDIC in accordance with the FAA. But when Regions Bank missed the FAA's express deadline to apply to the court for entry of judgment, it suddenly decided that it would rather be governed by South Carolina's arbitration law.[1]

The circuit court erred when it permitted Regions Bank to evade its own contract and to circumvent its clear agreement to be bound by the FAA, and the Court of Appeals erred in affirming that ruling. This Court should accept this case and rule that the FAA's one year statute of limitations barred Regions Bank's Petition to Confirm Arbitration Award, which was filed more than two years after the award.

[1] Notably, the arbitration provision at issue would not even be enforceable under South Carolina's Arbitration Act, because Regions Bank's "Regions Business Line" Agreement does not have conspicuous notice on the first page, in underlined capital letters, that it is subject to arbitration, as required by S.C. Code § 15-48-10(a). The arbitration provision at issue—which says that it is governed by the FAA—does not appear until the bottom of the third page of fine print. (R. pp. 27).

I. The FAA applies because the parties agreed that it would.

Regions Bank frames the question to this Court as one of whether and how its arbitration provision should be enforced and interpreted. It quotes the arbitration provision, which permits enforcement of an award in "any court having jurisdiction," and it asks whether the circuit court was correct to interpret this clause in accordance with South Carolina law. (Resp. Br. p. 1). Similarly, before the circuit court, Regions Bank also quoted the arbitration provision and argued that its entry of judgment clause should be construed and enforced in accordance with South Carolina law. (*See, e.g.*, R. p. 23, Petition ¶ 10).

And yet—now—Regions Bank makes the odd argument that this appeal does not stem from any issue of "construction, interpretation, [or] enforcement" of the Note's arbitration provision. But obviously, it does. Indeed, the very purpose of this lawsuit by Regions Bank is to seek entry of judgment on its arbitration award—an action that is made possible by enforcement of the arbitration provision. **There is no real question that this appeal is precisely about what law governs the interpretation and enforcement of that arbitration provision.** If the SCUAA applies, as Regions Bank urges, then the entry of judgment clause could be enforced pretty much whenever Regions Bank felt like it. But, if the FAA applies, then Regions Bank had one year from the date of the arbitration award to take it to court and have it entered as a judgment. 9 U.S.C. § 9.

The Note (drafted by Regions Bank) answers the question of which law applies. It says:

> The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision.

(R. p. 27 , Note, p. 3) (emphasis added).

In Regions Bank's argument that it should not be bound by the law that it chose to be binding, Regions Bank relies on *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221 (2013). This reliance is misplaced, because *Henderson* did not involve a difference between federal and state law—nor contract language like that at issue here. Moreover, Regions Bank omits material language when it quotes the *Henderson* decision: *Henderson* does not stand for the inflexible principle that "the FAA does not preempt state procedural law relating to arbitration"—it contains the caveat that this is so **only as a general rule.** *Id*. at 225 ("**The general rule is that** the FAA does not preempt state *procedural* law relating to arbitration.") (italics emphasis in original; bolded language omitted from Respondent's Brief).

The legal question for this Court is straightforward: does a "general rule" noted within this State's common law invalidate the specific contractual agreement between the parties, here? The answer is clearly "No" under basic contract law principles, which permit parties to agree to the rules by which they will be governed. The answer is also "No" under the policy of this State, which says that arbitration agreements are to be enforced as written. As such, this case has broad applicability in South Carolina and is appropriate for this Court to consider.

A. Contracts are to be enforced according to their terms.

The plain language of a contract determines its force and effect. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011). Here the Regions Bank Note is clear: it says that the arbitration provision (which includes an entry of judgment clause) is to be (1) construed, (2) interpreted, and (3) enforced in accordance with the FAA.[2] This means that the entry of judgment clause is to be construed and enforced in accordance with the FAA. The FAA requires a party to seek entry of judgment "within one year after the award is made." 9 U.S.C. § 9 (*see infra*, Section II).

It is well-established that parties may contract to terms as they see fit, even if those terms are contrary to the "general rules" that otherwise would apply by default. Regions Bank is a sophisticated party that wrote the contract at issue—and Regions Bank agreed that the Federal statute would apply. Regions Bank is bound by those terms, even if they limit its capacity to bring an enforcement action beyond one year. *See Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007) ("this Court acknowledges that parties are always free to contract away their rights . . . ."); *Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003) (parties to an agreement "may agree to any terms they wish as long as

---

[2] Regions Bank employs linguistic gymnastics to argue that the *Henderson* contract involved "broad[] language," when actually the arbitration clause in *Henderson* was quite narrow. As opposed to Regions Bank's provision at issue here (the entirety of which is governed by the FAA), the *Henderson* agreement was very clear that the FAA applied only to the arbitration proceeding itself (and not the enforcement or construction of the arbitration provision). *Henderson*, 748 S.E.2d at 223, 226 ("The sales contract prepared by Dealer contained an arbitration provision that required any disputes to be submitted to binding arbitration that 'shall be governed by the [FAA].' . . . the arbitration agreement stated the FAA would apply **to the arbitration.**") (emphasis added).

the court deems the contract to have been entered fairly, voluntarily and reasonably. . . .") (internal citations and quotations omitted); *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 19 S.E.2d 463, 199 S.C. 325 (S.C. 1942) ("judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.") (citing *Guarantee Co. v. Mechanics' Sav. Bank & Trust Co.*, 183 U.S. 402, 22 S.Ct. 124, 46 L. Ed. 253). In sum, Regions agreed that the Federal statute applied, and it may not change its agreement now.

B. Private agreements to arbitrate are to be enforced according to their terms.

That this dispute involves arbitration does not change how this Court should construe the contractual provision at issue. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021) (a court "must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions."). The parties here agreed that the FAA applies to the construction, interpretation, and enforcement of their arbitration provision, and the circuit court and Court of Appeals were wrong to find that a common law "general rule" about SCUAA procedure re-writes the express agreement (which Regions Bank drafted). *Parsons v. Homes*, 418 S.C. 1, 791 S.E.2d 128 (2016) ("Even though there is [a] presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.") (citation omitted) (internal quotation and

alteration marks omitted); *Wilson v. Willis*, 416 S.C. 395, 786 S.E.2d 571 (S.C. App. 2016) ("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.") (internal citations and quotations omitted).

Arbitration is a creature of contract, wherein the parties agree to be bound by their own rules for the resolution of disputes—outside of the court. This is more efficient, less expensive, and it also has the benefit of being predictable: parties to an arbitration agreement are governed by the rules that they have themselves chosen. Rather than slogging through a years-long court process, parties to an arbitration agreement can have their disputes decided promptly.

Regions Bank and CDIC contracted to have the FAA apply to the enforcement of their arbitration provision, including the FAA's swift mechanism for summary confirmation "within one year." The circuit court was wrong to find that South Carolina's Arbitration Act applied, instead of the agreed-upon Federal statute, and the Court of Appeals was incorrect in affirming that finding. This Court should accept this case and reverse.

II. Regions Bank failed to apply for confirmation "within one year."

As discussed above, the FAA applies to the interpretation, construction, and enforcement of the Note's provision: "Judgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction." (R. p. 27, Note). And the plain language of the FAA provides a limitations period of one year in which a party may seek court enforcement of an arbitration award:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award . . . .

9 U.S.C. § 9.[3]

As the Bank points out, the United States Supreme Court has not ruled on Section 9's "within one year" language. However, many federal courts have persuasively decided that the language clearly allows a party to pursue summary confirmation only "within one year after the award is made." *See General Elec. Co. v. Anson Stamping Co. Inc.*, 426 F. Supp. 2d 579, 583-591 (W.D. Ky. 2006) (providing an extremely thorough discussion of the federal split and the rationale behind each view).

Regions Bank and the Court of Appeals are wrong to suggest that a Fourth Circuit opinion controls this Court. **In the absence of a U.S. Supreme Court decision, this State Supreme Court is not required to adhere to the decision of any particular inferior federal court.** Neither the decisions of the Fourth Circuit nor certain other Circuits, nor

[3] Federal courts have discussed the difference between the summary confirmation described in Section 9 (which is what Regions Bank sought in this case) as opposed to a legal action on the arbitration award. *See, e.g.*, *Insurdata Marketing Serv. v. Healthplan Serv.*, 352 F. Supp. 2d 1252, 1255 (M.D. Fla. 2005) ("Sections 9 and 10 of the Federal Arbitration Act allow, through the convenient but not exclusive device of confirmation, the reduction of a non-judicial arbitral award to the form of a readily enforceable judgment, which permits execution and levy, fixes priority among creditors in some instances, places third parties on constructive notice of the judgment's contents, and subjects a judgment debtor to prompt supplemental proceedings, such as deposition in aid of execution, garnishment, levy, and the other formidable tools of collection.").

federal district courts in other states—all of which have differing opinions on Section 9 of the FAA[4]—constitute binding precedent on the South Carolina Supreme Court.

Instead, this Court must adhere to the clear language of the FAA itself, and the answer is as simple as fifth-grade grammar.[5] The FAA uses the express prepositional phrase, "within one year after the award is made," to modify and explain when "any party to the arbitration may apply to the court so specified for an order confirming the award." 9 U.S.C. § 9. Courts should not construe the FAA in such a way as to render superfluous certain words or phrases. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115, 121 S.Ct. 1302, 149 L. Ed.2d 234 (2001). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C.

---

[4] *See, e.g., Sverdrup Corp. v. WHC Constructors Inc.*, 989 F.2d 148, 156 (4th Cir. 1993) (one year language is permissive); *Photopaint Technologies LLC v. Smartlens Corp.*, 335 F.3d 152 (2d Cir. 2003) (holding that 9 U.S.C. § 9 contains a clear one-year limitation on the confirmation of arbitration awards, and finding the reasoning in *Sverdrup* has been subsequently contradicted by the Supreme Court); *Md. Transit Admin. v. Nat'l R.R. Passenger Corp.*, 372 F. Supp. 2d 478, 483-84 (D. Md. 2005) ("The court adheres to its view that *Sverdrup Corp*. is a candidate for reconsideration by the Fourth Circuit and, accordingly, shall dismiss without prejudice as untimely MTA's petition to enforce the first arbitration award."); *FIA Card Servs., N.A. v. Gachiengu*, 571 F. Supp. 2d 799, 803-05 (S.D. Tex. 2008); *Ameriprise Bank, FSB v. PNC Bank, Nat'l Ass'n* at 12, Civil Action No. 12-1113 (W.D. Pa. 2012) ("This principle strongly counsels in favor of reading § 9 to preclude the filing of a confirmation application more than a year after the date of an arbitral award"); *Krystoff v. Kalama Land Co., Ltd.*, 965 P.2d 142 (Haw. App. 1998) (one year bar on summary confirmation does not preclude other legal action on an arbitration award); *General Elec. Co. v. Anson Stamping Co. Inc.*, 426 F. Supp. 2d at 583-591 ("The fact that even the lower courts of the Fourth Circuit, such as the District Court of Maryland in *Maryland Transit Administration* are now openly calling for reconsideration and possible abandonment of *Sverdrup* merely serves to underscore the fundamental point that the entire line of cases that rely on what this Court believes to be an indiscriminate reading of *Kentucky River Mills* is now in serious doubt as to their continued viability. The natural and necessary reading of 9 U.S.C. § 9 and its confirmation provisions requires that the courts give full effect to the entire language of the statute including its one-year statute of limitations provision for confirmation proceedings. Accordingly, this Court joins with *Photopaint* and the *Photopaint* line of cases to hold that § 9 of the Act creates a mandatory one-year statute of limitations.").

[5] Bring it back!

495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (*quoting Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). "Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008).

The plain and ordinary meaning of Section 9's language contemplating confirmation proceedings "within one year after the award is made" should have barred Regions Bank from instituting confirmation proceedings after two years. This Court should so hold.

CONCLUSION

As stated at the outset of this Reply, this case has the potential for broad applicability within South Carolina: Can a bank that drafted the contract at issue simply switch law mid-stream, in violation of the expressly-agreed contractual terms? For the reasons set forth above and in CDIC's opening brief, this Court grant this Petition and should reverse the orders of the circuit court and Court of Appeals, and rule that Regions Bank's petition to confirm the arbitration award is barred by the one-year limitations period of the Federal Arbitration Act.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/ Ian Ford
Ian S. Ford (S.C. Bar 12463)
Ian.Ford@FordWallace.com
Ainsley F. Tillman (S.C. Bar 70551)
Ainsley.Tillman@FordWallace.com
715 King St. | Charleston, SC 29403
843-277-2011
www.FordWallace.com

Attorneys for Petitioner
CDIC Development Company, LLC

November 8, 2024
Charleston, South Carolina