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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. William A. McKinnon, Circuit Court Judge

Case No. 2023-CP-42-04147

Appellate Case No. 2024-000468

Lorraine Voros, by and through her duly appointed Attorney-In-Fact, John Voros, Respondents,

v.

Pacifica Skylyn, LLC, ... Appellant.

FINAL REPLY BRIEF OF APPELANT

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s/*Paul E. Allen, Jr.*
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

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ARGUMENT

I. The Circuit Court erred in adopting Plaintiff's "operative language" approach to contract interpretation.

Plaintiff's contention that this Court should limit its review of the subject arbitration provision to the "operative language" of the provision is in direct conflict with two of the most fundamental principles of contract law. South Carolina law is clear: when construing a contract, a court's primary objective is to ascertain and give effect to the intent of the parties to the contract, and the court must look to the language of the entire agreement in doing so. *See, e.g., Southern Atl. Fin. Servs., Inc. v. Middleton,* 349 S.C. 77, 80–81, 562 S.E.2d 482, 484–85 (Ct. App. 2002); *Thomas–McCain, Inc. v. Siter,* 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977). These principles apply with equal force when analyzing whether parties have shown a mutual intent to be bound by the terms of the contract, or whether a contract is supported by sufficient consideration. The circuit court did not consider the language of the entire agreement, nor did it give effect to the demonstrated intent of the parties. This Court should correct this fundamental error in the circuit court's analysis and reverse the Order Denying Pacifica's Motion to Compel Arbitration.

A. The Circuit Court erred in placing the arbitration provision on an unequal plane with other contracts when it failed to consider the language of the entire arbitration provision.

A mutual intent to be bound by the terms of a contract constitutes valid consideration. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304-05, 468 S.E.2d 292, 300 (1996). Plaintiff, however, contends this mutual intent must be shown in the first sentence of the subject arbitration provision. (Resp. Br. at p. 3). The circuit court erred in adopting Plaintiff's novel approach to contract interpretation, and effectively placed the arbitration agreement on an unequal plane with other contracts. *See Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1426-27 (2017) (invalidating a state rule that failed "to put arbitration agreements on an equal plane with

other contracts"). Plaintiff assigns great weight to Pacifica's counsel referring to the first sentence of the arbitration clause as containing the "operative language." But by making this observation, Pacifica's counsel did not ask the circuit court to ignore the rest of the arbitration clause, nor could such a statement relieve the circuit court of its obligation to consider the "whole scope and effect of the language used" in the arbitration clause. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

Plaintiff cites *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013), for the proposition that "ancillary logistical terms" or "parameters" cannot form a mutual intent to be bound if Pacifica did not objectively manifest an intent to arbitrate claims in the first sentence of the arbitration clause. In *York*, this Court held that ancillary logistical terms are not required for a valid arbitration clause. *Id.* at 82-83, 749 S.E.2d at 146-47. This Court did not hold that ancillary logistical terms found within the four corners of an arbitration clause cannot be considered as evidence of the parties' mutual intent to be bound. Here, the ancillary logistical terms, or parameters for arbitration, provide clear evidence of the parties' objective intent at the time the Agreement was executed. (App. Br. at p. 5-6).

B. The Circuit Court erred when it disregarded the mutual promises contained in the "operative language" of the arbitration provision in this case.

Even if mutual promises must be evident in the "operative language" of an arbitration provision, the Circuit Court erred in selectively enforcing the operative language in this case. Pacifica used the word "you" to signify that Plaintiff, or her duly appointed power of attorney, was the offeree and had the power to either accept or reject the contract's terms. *Cf. Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) ("The offer identifies the bargained for exchange and creates a power of acceptance in the offeree.") (citing *Restatement (Second) of Contract* § 24 (1981)). The words following "you

agree" demonstrate that Pacifica, as the offeror, also promised to submit claims to arbitration. The provision requires arbitration of "**any and all claims and disputes** arising from or related to this Agreement or your residency, care, or services at the Community." (emphasis added). In offering the Agreement to Plaintiff, Pacifica manifested its intent to arbitrate any and all claims arising from the Agreement with only limited exceptions related to specific claims. *Cf. O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997) ("The contract to arbitrate was proffered by the employer. Such a proffer clearly implies that both the employer and the employee would be bound by the arbitration process. If an employer asks an employee to submit to binding arbitration, it cannot then turn around and slip out of the arbitration process itself.").[1] The arbitration provision did not include language allowing Pacifica to avoid arbitration, nor has Pacifica sought to avoid arbitration in this litigation.

In this way, the terms of the arbitration provision in *York* are instructive. There, the operative language of the arbitration provision provided:

> PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT....

Id. at 81-82, 749 S.E.2d at 146. This Court found the above language demonstrated "the parties' unambiguous, mutual intent to arbitrate" even though the arbitration provision only referenced the purchaser. *Id.* Thus, even when considering only the first sentence of the subject arbitration

[1] Plaintiff appears to argue that *O'Neil* was incorrectly decided or is in conflict with subsequent decisions by South Carolina appellate courts. (Resp. Br. at p. 7-8). As noted in its initial brief, Pacifica emphasizes that *O'Neil* has been cited with approval by this Court when addressing arbitration provisions in the assisted living context as recently as last year. *See Hackworth v. Bayview Manor, LLC*, Op. No. 2023-UP-096 (S.C. Ct. App. Filed March 15, 2023); *St. Aubin v. THI of S.C. at Camp Care, LLC*, Op. No. 2023-UP-204 (S.C. Ct. App. Filed May 24, 2023).

provision, Plaintiff and Pacifica demonstrated a mutual intent to submit any and all claims arising from Plaintiff's residency at Pacifica to arbitration, with only limited exceptions, and this Court should reverse the Circuit Court's order denying Pacifica's motion to compel arbitration.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Pacifica's initial brief, Pacifica requests that this Court reverse the circuit court and stay this action in favor of arbitration of Plaintiff's claims or remand the case to the circuit court with instructions to stay the case and compel Plaintiff's claims to arbitration.

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

s/ Paul E. Allen, Jr.
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellant

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CERTIFICATE OF COUNSEL

It is hereby certified that the foregoing Final Reply Brief of Appellant in the above-captioned case complies with the requirements of Rule 211(b), SCACR.

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
1230 Main Street, Suite 325
Columbia, SC *29201*
Attorneys for Appellants