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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2023-CP-10-04865

Dow, Inc., ...Appellant

v.

Beth Bartolini .....Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the lower court err in denying Appellant's motion to compel arbitration on the grounds that the Appellant's interstate "Construction Contract" did not include the arbitration notice language required by S.C. Code Ann. §15-48-10(a) even though this notice language is not required under the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*)?

2. Did the lower court err in denying Appellant's motion to compel arbitration because the Appellant's arbitration clause was unenforceable under "law or in equity" pursuant to S.C. Code Ann. §15-48-10(a)?

STATEMENT OF THE CASE

This is an action brought to compel the Respondent into arbitration pursuant to the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*) The Respondent sought arbitration pursuant to the parties' August 17, 2022, "Construction Contract" to collect on the balance owed for its interior and exterior construction work at Respondent's residence. The Respondent refused to arbitrate.

On October 3, 2023, Appellant filed a Complaint seeking to have its claims heard in arbitration. (Complaint). On November 11, 2023, Respondent filed an Answer and Counterclaims seeking a jury trial. (Answer and Counterclaims). On November 20, 2023, Appellant filed "Plaintiff's Motion to Compel Arbitration Pursuant to the Federal Arbitration Act." (Motion to Compel Arbitration). This motion included a memorandum in support. (Memorandum in Support of Motion to Compel Arbitration). There was no discovery conducted in this matter pursuant to *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999).

On July 18, 2024, the Honorable Judge Maite Murphy heard the Appellant's Motion to Compel Arbitration. The day before this hearing, on July 17th, the Respondent filed a memorandum in opposition to Respondent's Motion to Compel Arbitration. (Memorandum in Opposition to Motion to Compel Arbitration). The Respondent's two arguments pursuant to S.C. Code Ann. §15-48-10(a) were as follows:

"1. The arbitration clause does not comply with South Carolina's Arbitration Act."

- This argument concerned the arbitration notice language required by S.C. Code Ann. §15-48-10(a).

"2. The alleged contract was procured by fraud and as such is invalid and unenforceable. As such, the arbitration clause contained within is also invalid"

- This argument stated that under S.C. Code Ann. §15-48-10(a) an arbitration agreement may be invalid and unenforceable, "if the Court finds an arbitration clause unconscionable, the Court may refuse to enforce the clause."

The Respondent submitted no affidavits in support of its arguments, as a result of which there is no factual basis for the contention that the contract was procured by fraud. Appellant submitted an affidavit by its President, Scott Dow, in opposition to Respondent's arguments. (Affidavit of Scott Dow).

On November 20, 2024, the Honorable Judge Maite Murphy issued a Form 4 Order denying the Appellant's motion to compel arbitration "for its failure to comply with South Carolina Code Section 15-48-10(a)." (Form 4 Order).

While the Court's Form 4 Order did not specifically identify which alleged defect rendered the arbitration clause unenforceable, the Respondent's two arguments that implicated S.C. Code Ann. §15-48-10(a) and which the Circuit Court adopted were that (1) the arbitration clause does not comply with South Carolina's Arbitration Act's notice provision and (2) that the alleged contract was procured by fraud. This appeal followed.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review. *Wellman, Inc. v. Square D Co*., 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)[1].

[1] In this instance there were no factual findings as a Form 4 Order was issued.

STATEMENT OF FACTS

On August 17, 2022, the parties entered into a binding eleven page "Construction Contract" for interior and exterior construction work at Respondent's residence. (Construction Contract). The parties initialed each and every page of the Construction Contract, signed the same in front of two witnesses, and it was notarized by one of the witnesses. (Construction Contract).

On September 6, 2023, the Appellant invoiced the Respondent for the remaining balance of seventy-one thousand, four hundred and fifty and 71/100 ($71,450.71) for services rendered under the Construction Contract. (Invoice, See Exhibit B to Complaint). Despite repeated demands, the Respondent failed to pay for the Appellant's labor, equipment, and materials necessary for the installation of the interior and exterior work at Respondent's residence.

The scope of work in the Construction Contract included, but was not limited to, such items as replacing windows, replacing deteriorated floor joists, installing new flooring on the first floor, repairing or replacing the air handler in the attic, gutting the first-floor bath and the replacement and installation of a new glass door for the office and installation of a new wall at the exterior of the breakfast area.

Article 11 of the Construction Contract appears in bold and is titled as "**ARBITRATION OF DISPUTES**" and states as follows:

ARTICLE 11. ARBITRATION OF DISPUTES

11.1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof

ARTICLE 12. WARRANTY

12.1 At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for **one year** against defects in workmanship or materials utilized. The manufacturers warranty will prevail. No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after **(one years)** beyond the completion of the project or cessation of work

Initialed by: Owner Contractor

(Construction Contract, p. 3). Although the Construction Contract expresses a clear intent to arbitrate disputes, it does not contain the arbitration notice language prescribed by S.C. Code Ann. §15-48-10(a) on page one.

ARGUMENT

1. The lower court erred in denying Appellant's Motion to Compel Arbitration simply because the Appellant's interstate Construction Contract did not have the arbitration notice language required by S.C. Code Ann. §15-48-10(a) because the Construction Contract in question clearly implicates interstate commerce and is arbitrable under the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*).

While the Construction Contract lacks the arbitration notice required by South Carolina statute and is therefore not arbitrable under South Carolina state law, the arbitration provision in question is valid under Federal law because the Construction Contract's scope of work implicates interstate commerce. As per the Complaint, the Appellant's "claim" concerns construction work on a residential home. (Complaint, para. 7). In order to repair the Respondent's home, the required building materials and supplies traveled interstate highways and crossed state lines into South Carolina.

Paragraph fifteen of the Complaint states as follows:, "The Contract deals with interstate commerce because the Contract contemplated and then used materials manufactured outside the

state of South Carolina and could not have been completed without the use of materials provided via interstate commerce." (Complaint, para. 15). The Appellant's President, Scott Dow, provided the Circuit Court with an affidavit concerning the use of interstate commerce in this construction work and swore as follows: "All the materials required for the scope of work listed above involved interstate commerce based on my understanding of that term." (Scott Dow Affidavit, para. 12).

Because the Construction Contract involves interstate commerce, the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*) must be examined. Specifically, 9 U.S.C.A. §2, provides that:

> [a] written provision in any… contract evidencing a ***transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis supplied.)

Based on this federal statutory supremacy language, the arbitration clause in the Construction Contract is valid and enforceable on the parties pursuant to the Federal Arbitration Act because the parties were both involved in interstate commerce.

The South Carolina Supreme Court has opined on the supremacy of the Federal Arbitration Act over the South Carolina Uniform Arbitration Act (S.C. Code Ann. §15-48-10 *et seq.*) when it ruled in *Osteen v. T.E. Cuttino Const. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993) that an arbitration clause in a ***construction contract*** was not invalid for failing to comply with §15-48-10 et seq. because the contract involved interstate commerce; consequently, federal substantive law supplanted state law regarding arbitration (emphasis supplied). Of course, the present matter also involves a construction contract.

Also, in *Godwin v. Stanley Smith & Sons*, 300 S.C. 90, 386 S.E.2d 464 (Ct.App. 1989), the South Carolina Court of Appeals held that an arbitration provision in a contract was enforceable under the Federal Arbitration Act, even if it was not enforceable under the South Carolina Uniform

Arbitration Act because the Federal Arbitration Act supersedes the South Carolina Uniform Arbitration Act.

Consequently, any argument that the Construction Contract fails to meet the standards required by the South Carolina Uniform Arbitration Act is immaterial because the parties were involved in interstate commerce and because their Construction Contract requires arbitration. Thus, the Federal Arbitration Act pre-empts state law governing the enforceability of the arbitration clause in question because interstate commerce is implicated and the parties agreed in writing to arbitration.

In addition, Federal Courts have opined that the basic purpose of the Federal Arbitration Act is to promote the speedy disposition of disputes without the expense and delay of extended court proceedings. *U.S. for Use of Duo Metal and Iron Works, Inc. vs. S.T.C. Const. Co.*, E.D. Pa. 1979, 472 F.Supp. 1023. This litigation has been the opposite of speedy. The Complaint was filed on October 3, 2023, the hearing was on July 19, 2024, nine months later, and the Form 4 Order was issued on November 20, 2024, four months after the hearing. This type of litigation delay is the precise reason why the Appellant has an arbitration provision.

South Carolina courts also have an unbending public policy which favors arbitration which has been supported in a legion of cases for the past thirty years. In 2002, the South Carolina Supreme Court directed the lower courts to resolve any doubts concerning the scope of arbitrable issues "in favor of arbitration". *Bazzel v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). The South Carolina Court of Appeals followed suit in 2003 when it stated that it is the policy of the State to favor arbitration of disputes. *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 588 S.E.2d 639 (Ct.App. 2003).

Based on the facts cited above and the well-established law cited herein, the Circuit Court erred in failing to compel the Respondent into arbitration even though the Construction Contract did not have the arbitration notice language required by S.C. Code Ann. §15-48-10(a) because this notice language is not required under the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*) when interstate commerce is involved.

2. Did the lower court err in denying Appellant's Motion to Compel Arbitration because the Appellant's arbitration clause was not enforceable under "law or in equity" pursuant to S.C. Code Ann. §15-48-10(a)?

On August 17, 2022, the parties freely entered into a binding Construction Contract for interior and exterior construction work at Defendant's residence. The Construction Contract was **Exhibit A** to the Appellant's Complaint and properly before the Circuit Court as evidence of the parties' transaction.

Critically, the parties initialed each and every page of the Construction Contract, signed the same in front of two witnesses, and it was notarized by one of the witnesses. If the Respondent had expressed any doubts or concerns about any fraudulent activity at execution of the Construction Contract on August 17, 2022, then the witnesses and notary would not have signed the same. As per the affidavit of Scott Dow, President of the Appellant, he swore, "That I watched and saw the Defendant read the Contract, initial under the above referenced arbitration provision as well as all pages of the Contract, and sign the Contract. In addition, the Defendant did not have any questions or issues with any section of the Contract before she executed the Contract." (Affidavit of Scott Dow, para. 9). Critically, the Respondent did not submit an affidavit or produce any evidence for the July 18th hearing. Thus, the record is devoid of any evidence that the Respondent was under duress, that fraud had occurred, that she did not understand the contract, etc.

Therefore, the only logical way to interpret Judge Murphy's Form 4 Order concerning her use of S.C. Code Ann. §15-48-10(a) is that the Construction Contract failed because it did not have the arbitration notice provision. It defies logic to read her Order to include that the Construction Contract failed due to "law or in equity" or fraud/unconscionability because the record has no proof of the same. Consequently, the only proof in the record is via the Scott Dow affidavit cited above that there was no fraud. However, out of an abundance of caution the Appellant has addressed this argument in anticipation that the Respondent will attempt to argue unconscionability as a grounds to avoid arbitration.

Furthermore, the Respondent's initials are immediately adjacent to **ARTICLE 11. ARBITRATION OF DISPUTES** which is in bold and small capitals as it appears herein and which states in ***one simple sentence*** the following: "Any controversary or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the Arbitrations may be entered in any court having jurisdiction thereof." (Construction Contract, p. 3).

The arbitration clause listed above is clear and unambiguous. "Any controversy or claim" relating to the Contract shall be settled by "arbitration administered by the American Arbitration Association." This language is not confusing or obtuse. To the contrary, it is straightforward and simple. Despite these facts, the Respondent argues that this contract was precured by fraud and the arbitration language is unconscionable.

In *Simpson vs. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 644 S.E.2d 663, (2007), the South Carolina Supreme Court examined the issue of fraud and unconscionability in arbitration provisions pursuant to S.C. Code Ann. §15-48-10(a) in great detail. *Simpson* dealt with an

automobile dealership and a customer entered into a written contract whereby the customer trade in her used vehicle for a new vehicle. The written contract contained an arbitration clause. The Court held in part as follows (emphasis supplied throughout):

> ***There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes***. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S.C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.
>
> Despite these clear rules, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).
>
> General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364***. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.*** *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).
>
> In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). ***It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms***.
>
> … Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *Id*. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the

> parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id*. at 293. See also *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("***A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case***." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In analyzing the particular facts of this matter in conjunction with the federal and South Carolina policy of favoring arbitration, it is clear that the Construction Contract at issue in this matter is not unconscionable and does not contain any one-sided terms. The Respondent had a meaningful choice in executing the contract and, once again, did so in front of witnesses and a notary. The one sentence arbitration provision is not one sided as both parties have to abide by the same rules. The rules for arbitration are the Construction Industry Arbitration Rules.

In addition, this is not a contract of adhesion. This is not a standard form contract but the exact opposite as the terms are particular to the Respondent's residence. Also, it is obviously not a take or leave contract with terms that are not negotiable. The Respondent made no claim that she did not possess the business judgment necessary to be aware of the implications of the arbitration clause. In addition, there is the general legal presumption that a party to a contract has read it and understands the contract's terms. See *Munoz,* 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); *Towles,* 338 S.C. at 39, 524 S.E.2d at 845 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document.")

The conspicuous nature of the arbitration clause is also significant. Although not on the first page of the Construction Contract, the Respondent's initials are in close proximity to the arbitration clause and the title of the provision is in bold and a small capital font and the same font size as the rest of the contract. In other words, the arbitration clause is not hidden in fine print.

Based on the facts cited above and the well-established law cited herein, the Circuit Court did err in failing to compel the Respondent into arbitration because the Construction Contract was not procured by fraud or is unconscionable.

CONCLUSION

Simply put, just because the Respondent had second thoughts about arbitration does not render the arbitration clause in the Construction Contract unenforceable or unconscionable. Therefore, the Circuit Court's November 20, 2024, Form 4 Order should be reversed and this matter should be ruled into arbitration pursuant to the Federal Arbitration Act.

Respectfully submitted,

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