RECEIVED
Mar 05 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2024-001841

Arlene Gariepy, Lee Gariepy, Kimberlee Elliott
and Noah Gariepy,… .....Plaintiffs/Respondents,

v.

Midgard Self Storage Seneca SC, LLC
and Reliant Real Estate Management, LLC,.....Defendants/Appellants.

INITIAL BRIEF OF RESPONDENTS

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK & KEITH, P.A.

Matthew T. Reitz, Bar No. 105844
matt@uricchio.com
Post Office Box 399
Charleston, South Carolina 29402
Tel: 843.723.7491 | Fax: 843.577.4179
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES

STATEMENT OF ISSUES ON APPEAL

Whether the trial court correctly denied Appellants' motion to compel arbitration based on a finding that Appellants waived their right to enforce arbitration?

STATEMENT OF THE CASE

On September 22, 2023, Respondents filed suit against Appellants alleging several claims, including breach of contract, conversion, negligent misrepresentation and violation of the South Carolina Unfair Trade Practices Act and demanded a jury trial. *See* Summons and Complaint. On October 23, 2023, Appellants filed their answer denying Respondents' claims, demanded a jury trial, and requested trial bifurcation on the issues of actual damages and punitive damages. *See* Answer.

On September 6, 2024, three hundred fifty-one (351) days after Respondents filed suit and three hundred twenty (320) days after filing their answer, Appellants filed their motion to compel arbitration. *See* Motion to Compel Arbitration. On September 18, 2024, Respondents filed their response to Appellants' motion to compel arbitration. *See* Response and Memorandum of Law in Opposition of Defendants' Motion to Compel Arbitration. On September 19, 2024, Respondents' motion to compel arbitration was heard before the Honorable R. Scott Sprouse. On September 23, 2024, Judge Sprouse signed a "Form 4" Order denying Appellants' motion to compel arbitration. *See* Order/Electronic Form 4, dated September 23, 2024. Judge Sprouse's Order stated:

> After careful consideration of the materials submitted, arguments of counsel, and the applicable law, the Defendant's Motion to Compel Arbitration is DENIED. The Court finds that the parties have conducted significant discovery and a substantial length of time has transpired between the commencement of the action and the commencement of the Motion to Compel Arbitration, which has resulted in prejudice to the Plaintiff. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125 (Ct. App. 2007). The Court notes that the Defendant demanded a jury trial in their answer, waited over three hundred (300) days to commence their Motion to Compel Arbitration, took multiple depositions, and engaged in extensive written discovery.

(Order/Electronic Form 4, dated September 23, 2024).

On October 3, 2024, Appellants filed their motion to reconsider. *See* Motion to Reconsider Motion to Compel Arbitration. On October 4, 2024, Judge Sprouse signed a "Form 4" Order denying Appellants' motion to reconsider. *See* Order/Electronic Form 4, dated October 4, 2024. Judge Sprouse's Order stated:

> After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, Defendants' Motion to Reconsider is DENIED.

(Order/Electronic Form 4, dated October 4, 2024).

On October 25, 2024, Appellants filed their notice of appeal.

STANDARD OF REVIEW

"Determining whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

ARGUMENT

The trial court's order denying Appellants' motion to compel arbitration should be affirmed because Appellants delayed in seeking to enforce arbitration and substantially participated in litigation which prejudiced Respondents.

1. Appellants delayed in seeking to enforce arbitration.

South Carolina courts hold that the right to compel arbitration is not absolute. "Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "To establish waiver, a party must show prejudice through an undue burden caused by delay

in demanding arbitration." *Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC. Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). "Moreover, the fact that a party desiring arbitration did not assert the affirmative defense of arbitration in its answer is certainly relevant to a court's waiver consideration. *Commonwealth Equity Servs. v. Messick*, 152 Md. App. 381, 398, 831 A.2d 1144, 1154 (2003). *See id.* (citing with approval *City of Niagara Falls v. Rudolph*, 91 A.D.2d 817, 458 N.Y.S.2d 97 (App. Div. 1982), in which the court held that a failure to assert the right to arbitration, together with the subsequent resort to discovery and participation in pre-trial activities, were sufficient to show waiver). The court did not err in giving consideration to appellants' delay in raising the arbitration issue." *Messick.*

Here, it is undisputed that the parties entered into a self-storage rental agreement on June 29, 2023. Appellants contend that an arbitration clause embedded on page eight (8) of the eleven (11) page agreement authorizes them to enforce arbitration. Notably, in their answer filed October 23, 2023, Appellants demanded a jury trial and failed to assert the affirmative defense of arbitration. On September 6, 2024, three hundred twenty (320) days after filing their answer, Appellants moved to enforce arbitration. This was relevant to the trial court's analysis and holding that Appellants waived arbitration. In addition to delay, the trial court relied on Appellants' conduct in actively litigating this case in determining Appellants waived arbitration.

2. Appellants substantially participated in discovery.

South Carolina law suggests that the right to arbitrate may be waived by participating in discovery. *See Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 417 S.E. 2d 622, 624 (Ct. App. 1992); and *Bonnete v. State*, 282 S.E. 2d 597, 597 (1981). The extent to which a party engaged in discovery is material to the court's analysis in determining waiver. *See Blitz v. USAA Gen. Indem. Co.*, Civil Action No. RDB-24-1070, 2024 U.S. Dist. LEXIS 208576, at *13-14 (D. Md. Nov. 18,

2024). "The extent to which a party has engaged in discovery and other trial-oriented activities before invoking arbitration or appraisal "is material to a court's assessment of whether that party has actively litigated in a case." *Messick*. Therefore, serving interrogatories and requests for production makes waiver more likely because it suggests intent to proceed with litigation. *See id.* (holding company waived arbitration right in part because it served interrogatories and requests for production, which are not typically available in arbitration proceedings). *Blitz*. Prior to the Supreme Court's 2022 decision in *Morgan v. Sundance, Inc.*, federal courts required that a party raising waiver of a contractual right to appraisal or arbitration under the FAA prove actual prejudice. *Blitz*; *See, e.g.*, *MicroStrategy Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001). In *Morgan v. Sundance, Inc.*, the Supreme Court held that "prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA." 596 U.S. 411, 418-19, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). *Blitz*.

Turning to the facts of this case, the parties have actively pursued litigation and substantially participated in discovery. On October 7, 2023, Respondents served Appellants with interrogatories, requests for production, and requests for admission along with the lawsuit. On October 23, 2023, Appellants served Respondents with interrogatories and requests for production. On November 13, 2023, Appellants served their answers to Respondents' first set of interrogatories, first set of requests for production, and first set of requests for admission. On November 16, 2023, Respondents served their answers to Appellants interrogatories and requests for production and also served Appellants with their first set of supplemental requests for production. On December 1, 2023, Respondents served Appellants with their second set of supplemental requests for production. On December 15, 2023, Appellants served supplemental responses to Respondents' first set of requests for production and served their responses to

Respondents' first set of supplemental requests for production and second set of supplemental requests for production. On February 18, 2024, Respondents served Appellants with their first set of supplemental interrogatories. On March 28, 2024, Appellants served their answers to Respondents' first set of supplemental interrogatories. On July 12, 2024, Respondents served Appellants with their second set of supplemental interrogatories. On July 30, 2024, Respondents served Appellants with their second set of requests for admission. On September 5, 2024, **one day prior** to filing their motion to compel arbitration, Appellants served their responses to Respondents' second set of requests for admission. Most recently, on September 10, 2024, **four days after** filing their motion to compel arbitration, Appellants served their answers to Respondents' second set of supplemental interrogatories and responses to Respondents' third set of supplemental requests for production. On October 7, 2024, Respondents served their supplemental answers to Appellants' interrogatories and requests for production.

On May 28, 2024, the parties submitted a consent scheduling order that was signed by the Honorable R. Lawton McIntosh which provided that mediation was to be held no later than September 1, 2024, and that this case would not have been called for trial before December 8, 2024. *See* Consent Scheduling Order. On August 15, 2024, the parties participated in mediation in compliance with the consent scheduling order. *See* Proof of ADR. On September 6, 2024, ninety-three (93) days before this case was subject to be called for trial, Appellants filed their motion to compel arbitration.

In addition to extensive written discovery, the parties conducted depositions and thereby incurred significant pre-trial costs. On November 30, 2023, Respondents took the deposition of Appellants pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure. Appellants designated two corporate representatives as witnesses for said deposition, Jill Erin Van Dyne and

Rebecca Allen. On February 2, 2024, Respondents took the deposition of Sattler Van Dyne, the market manager in charge of the self-storage facility in this case. On February 29, 2024, Respondents took the deposition of Jill Erin Van Dyne in her individual capacity. On May 28, 2024, Appellants took the deposition of Leo (Lee) Ray Gariepy, Jr., and Arlene J. Gariepy, two of the named Respondents in this case. On September 3, 2024, three (3) days before filing their motion to compel arbitration, Appellants' counsel provided potential dates for the deposition another witness in this case, Brian Markheim. *See* Email from Appellants' counsel, dated September 3, 2024.

Significant discovery has been conducted in this case. Appellants' conduct in actively litigating this case and participating in extensive discovery suggests an intent to proceed to trial and is inconsistent with arbitration. Thus, the trial court properly held that Appellants waived their right to enforce arbitration.

CONCLUSION

Based upon the foregoing, the trial court's order denying Appellants' motion to compel arbitration should be AFFIRMED.

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK & KEITH, P.A.

Matthew T. Reitz, Bar No. 105844
matt@uricchio.com
Post Office Box 399
Charleston, South Carolina 29402
Tel: 843.723.7491 | Fax: 843.577.4179
Attorneys for Respondents

March 5, 2025
Charleston, South Carolina