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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

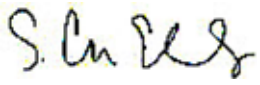
Appellate Case No.: 2024-001841

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.

APPELLANT'S REPLY BRIEF



S. Carson Shealy
Brett H. Bayne
McAngus, Goudelock & Courie LLC
Post Office Box 12519
1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211
(803) 779-2300
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

Appellants Midgard Self Storage Seneca SC, LLC, and Reliant Real Estate Management, LLC, ("Appellants") reply to the Initial Brief of Respondents.

ARGUMENT

Despite Respondents' arguments to the contrary, the facts and law demonstrate that the trial court erred in denying Appellants' Motion to Compel Arbitration.

1. Appellants' motion to compel arbitration was timely pursuant to the parties' agreement.

There is no dispute that (1) the parties had a valid, enforceable, and binding agreement; (2) the agreement contained a valid, enforceable, and binding arbitration provision; (3) the arbitration provision expressly permitted either party to seek arbitration *at any time* within a two-year period after Respondents vacated the self-storage unit; and (4) Appellants sought arbitration within that two-year period. Appellants pursuit of arbitration, therefore, was timely.

At no point in their Initial Brief do Respondents contest or dispute that the agreement and arbitration provision contained therein were invalid, unenforceable, or non-binding on any of the Respondents. They also do not dispute that the arbitration provision expressly permitted either party to seek arbitration within a two-year period after the accrual of their claims. They merely contend that the amount of time between the filing of Appellants' answer and motion to compel arbitration was too lengthy.

The Federal Arbitration Act ("FAA"), which the parties agreed controls, does not contain a time limit in which demands for arbitration must be made. *See generally* 9 USCS, Ch. 1, §§ 1-16. In the absence of a statutory time limitation, the law affords great weight to the agreement between the parties. *See 200 Levee Drive Assocs. v. Bor-Son Bldg. Corp.*, 441 N.W.2d 560, 563 (Minn. App. 1989) ("The Uniform Arbitration Act does not limit the time in which arbitration

must be demanded. Therefore 'this gap or arguable deficiency' must be filled by agreement of the parties."). Under the FAA, courts must enforce private arbitration agreements in accordance with their terms. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989). The terms of the arbitration agreement in this case are unambiguous:

> **ARBITRATION:** In the event of any claim, dispute or lawsuit by Occupant against Owner (or Owner against Occupant) arising from Occupant's rental or use of the Space or this Lease, the claim or lawsuit shall be submitted to binding arbitration upon the request of either party and the service of that request on the other party. The parties agree that the arbitration shall be conducted and heard by a single arbitrator to resolve the claim, dispute or lawsuit. THE ARBITRATION MUST BE CONDUCTED ON AN INDIVIDUAL BASIS AND OCCUPANT AND OWNER AGREE NOT TO ACT AS A CLASS-REPRESENTATIVE OR IN A PRIVATE ATTORNEY GENERAL CAPACITY IN ANY CLAIM, DISPUTE OR LAWSUIT. Owner will not request to arbitrate any claim, dispute or lawsuit that Occupant brings in small claims court. However, if such a claim is transferred, removed or appealed to a different court, Owner may then choose to arbitrate. The arbitration must be brought within the time set by the applicable statute of limitations or within two years of Occupant vacating the premises, whichever occurs first. The Federal Arbitration Act (FAA) shall govern this arbitration agreement. The Arbitration shall be conducted by National Arbitration and Mediation (NAM) under its Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry. The NAM arbitration rules and procedures may be found at www.namadr.com. Occupant understands that Occupant is entitled to a judicial adjudication of disputes with the Owner with respect to this Lease and is waiving that right. The parties are aware of the limited circumstances under which a challenge to an arbitration award may be made and agree to those limitations. Owner and Occupant stipulate and agree that they have had sufficient time and opportunity to consider the implications of their decision to arbitrate and that this provision concerning arbitration represents a voluntary choice after due consideration of the consequences of entering into this provision and Agreement. IF OWNER CHOOSES ARBITRATION, OCCUPANT SHALL NOT HAVE THE RIGHT TO LITIGATE SUCH CLAIM OR LAWSUIT IN COURT OR TO HAVE A JURY TRIAL. OCCUPANT IS ALSO GIVING UP OCCUPANT'S RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER COLLECTIVE ACTION LAWSUIT OR ARBITRATION.

See Exhibit 1 to Defendants' Memorandum in Support of Motion to Compel Arbitration, Self-Storage Rental Agreement with Self-Storage Lien, pg. 8, at ¶ 31. The parties clearly

contracted that the timeline for arbitration shall be "within the time set by the applicable statute of limitations or within two years of Occupant vacating the premises, whichever occurs first." *Id.* Appellants have demanded arbitration within two years of Respondents vacating the premises. *See* Summons and Complaint; Defendants' Motion to Compel Arbitration. Therefore, pursuant to the agreement of the parties, Appellants' motion to compel arbitration was timely.

2. Arbitration is not an affirmative defense required to be plead in a responsive pleading.

Respondents also argue that Appellants' motion to compel arbitration was untimely as arbitration was not asserted as an affirmative defense in Appellants' answer. This argument fails. There is no *per se* rule that an affirmative defense of arbitration must be plead in an answer to avoid waiver. *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105-106 (2nd Cir. 2002); *see also Ex parte Hood*, 712 So.2d 341, 346 (Ala 1998) (failing to plead in one's answer that plaintiff's claims are subject to arbitration will not in itself constitute waiver); *Garvin v. Independence Place Condo Ass'n*, 2002 Ohio App. LEXIS 1491 (Ohio App. 2002) (failing to plead the issue of arbitration as an affirmative defense, alone, does not constitute waiver).

And, under both the Federal Rules of Civil Procedure and the South Carolina Rules of Civil Procedure, "arbitration and award" is an affirmative defense, not "arbitration." *See* Fed. R. Civ. P. 8(c)(1); S.C. R. Civ. P. 8(c). As explained by the U.S. District Court for the Eastern District of Pennsylvania, the affirmative defense of "arbitration and award" is applicable in cases where an arbitration has already taken place and an award has been rendered; by contrast, the defense that a party is entitled to arbitration is not an affirmative defense and is not waived by failure to assert it in a responsive pleading. *Forms, Inc. v. American Standard, Inc.*, 550 F.Supp. 556, 557 (E.D. Pa. 1982). Here, Appellants are not seeking to enforce an award previously

rendered in arbitration. They are merely seeking to compel arbitration so that such an award can be determined.

Thus, Appellants' did not waive their ability to compel arbitration by not asserting "arbitration" as a purported affirmative defense in their answer.

3. Appellants' participation in discovery was necessary and does not constitute waiver.

Respondents argue that Appellants substantially participated in discovery, resulting in significant pre-trial costs, and, therefore, have waived their right to arbitration. However, incurring legal expenses, without more, is insufficient to justify a finding of wavier. *Brownstone Inv. Group v. Levey*, 514 F.Supp. 2d 536, 552 (S.D. N.Y. 2007); *see also J. Cumby Constr., Inc. v. Mastin's, Inc.*, 458 F. Supp. 3d 850 (M.D. Tenn. 2020). Importantly, as Respondents concede in their Initial Brief, the Supreme Court has held that the opposing party's prejudice is no longer a condition for courts to consider when determining waiver under the FAA. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-19 (2022) ("To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right.). Thus, expenses incurred by Respondents have no relevance to this Court's determination of waiver.

Respondents' argument that the sheer volume of discovery conducted by the parties constitutes a waiver of the right to arbitration also completely ignores their availability in the arbitration process. Pursuant to the Agreement, arbitration would be conducted by National Arbitration and Mediation under its Comprehensive Dispute Resolution Rules and Procedures for the Self-Storage Industry and, pursuant to those rules and procedures, "The parties shall conduct discovery on a voluntary basis, the procedure of which shall be agreed to by the parties…" *See* Exhibit 4 to Defendants' Memorandum in Support of Motion to Compel Arbitration, National Arbitration and Mediation, Self-Storage Industry Dispute Resolution Rules

and Procedures, Rule 18(A). Further, as discussed in Appellants' Initial Brief, due to the nature of Respondents' claims and the facts at issue in this case, discovery would have been necessary for any adjudicator to make an informed decision on the case. Specifically, the lack of evidentiary support for Respondents' contention that Appellants' employee told them to use a self-storage unit other than the unit designated in their lease required discovery and depositions of any witness who may have had useful information on the matter.

Finally, courts across the country have declined to find a waiver of the right to arbitration by parties who demanded for arbitration later in the litigation process and who engaged in more extensive discovery than Appellants did in this case. *See Brownstone Inv. Group*, F.Supp. 2d. at 550-53 (no waiver despite delay of over ten months, thousands of pages of document production, seven depositions, and sworn interrogatory and request for admission responses); *Sweater Bee by Banff, Ltd. V. Manhattan Indus.*, 754 F.2d. 457, 460-61 (2nd Cir. 1985) (no waiver despite delay of over two years since litigation began, two discovery motions litigated, 6,000 pages of documents produced, and successful partial judgment on the merits before seeking arbitration); *Rich v. Walsh*, 357 S.C. 64, 72-73, 590 S.E.2d 506, 510-11 (Ct. App. 2003) (no waiver despite delay of thirteen months since litigation began, party seeking arbitration submitted only one set of interrogatories and requests for admission, took one brief deposition, and filed one motion to compel discovery).

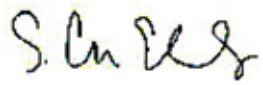
Appellants have not waived their right to arbitration through their limited participation in the discovery process.

CONCLUSION

This Court should reverse and vacate the trial court's denial of Appellants' Motion to Compel Arbitration. The court should remand this action with instructions to compel the parties to arbitration.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



S. Carson Shealy
Brett H. Bayne
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