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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
NINTH JUDICIAL CIRCUIT

The Honorable George M. McFaddin, Jr.

Appellate Court Case No. 2025-001001
Circuit Court Case No. 2022-CP-10-03817

Richard Pennoyer,.....Respondent,

v.

Harold Lenn Jewel a/k/a Lenn Jewel and Spiffy 3, LLC,.....Appellants.

INITIAL BRIEF OF APPELLANTS

August 6, 2025

s/John A. Massalon
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

The trial court erred in denying the motion to dismiss the Complaint and compel arbitration.

STATEMENT OF THE CASE

Respondent alleges in the Amended Complaint that he owns eighteen percent (18%) of Appellant Spiffy 3, LLC (hereafter "Spiffy") pursuant to the Spiffy Operating Agreement ("Spiffy OA"). (Amended Complaint Para. 9; Spiffy OA p. 24). Appellant Jewel is a managing member of Spiffy. (Amended Complaint Para. 15; Spiffy OA p. 3). Appellant Spiffy is the majority member of another entity named SC North Charleston Uptown, LLC ("Uptown"). (Amended Complaint Para. 10; Uptown OA p. 41). Neither Respondent nor Appellant Jewel are members of Uptown. (Uptown OA p. 39-40). Appellant Jewel is a co-manager of Uptown. (Uptown OA p. 15). Uptown owns various parcels of real estate in a mixed use development in the Centre Pointe area of North Charleston near the Tanger Outlets and the North Charleston Coliseum and Convention Center.

In the Amended Complaint Respondent alleges that Appellant Jewel used his position as the managing member of Spiffy to cause Uptown to sell various parcels below market prices to benefit businesses other than Spiffy in which Appellant Jewel is involved but which Respondent is not. (Amended Compliant Para. 16). Respondent's lawsuit alleges various claims on his own behalf and derivatively on behalf of Spiffy pursuant to S.C. Code § 33-44-1102. (Amended Complaint Para. 20-22). Specifically, the Amended Complaint alleges causes of action for breach of the duty of loyalty, care, good faith, and fair dealing, arising from the Spiffy 3, LLC Operating Agreement, and gross negligence. (Amended Complaint Para. 23-35). Additionally, the Amended Complaint seeks equitable relief for an accounting, damages for alleged corporate waste for which

Respondent seeks the return of assets to Spiffy, and unjust enrichment. (Amended Complaint Para. 36-49).

Appellants Jewel and Spiffy filed a Motion to Dismiss or Compel Arbitration which was heard by the Honorable George M. McFadden, Jr. on April 6, 2023. (Motion to Dismiss or Compel Arbitration; Transcript). In support of the Motion to Dismiss or Compel Arbitration, Appellants filed a memorandum stating the court should dismiss this action pursuant to SCRCP, Rules 12(b)(1) and 12(b)(6) because the court lacked subject matter jurisdiction due to the Spiffy OA requiring any claim or dispute be submitted to binding arbitration. (Memo. in Support p. 2). Respondent brought this action derivatively on behalf of Spiffy, while his other claims are based on the duties spelled out in the Spiffy OA. (Motion to Dismiss; Memo. in Support p. 3). Alternatively, Appellants asked for an order staying the matter and compelling the parties to arbitration. (Motion to Dismiss; Memo. in Support p. 2).

In opposition to the Motion to Dismiss or Compel Arbitration, Respondent Pennoyer asserted that Jewel and Spiffy should be denied because the arbitration clause is only enforceable where the dispute is foreseeable when entering into the agreement. (Memo. in Opp. to MTD p. 2). Respondent also argued that arbitration should not be compelled because he could not conduct "meaningful discovery" in arbitration and may not be able to name additional parties in an arbitration. (Memo. in Opp. to MTD p. 3).

The court denied the motion to dismiss or compel arbitration in a written order dated October 16, 2024. (Order Denying Motion to Dismiss or Compel Arbitration). Appellants promptly filed a Motion to Alter or Amend under Rule 52(b). (Motion to Alter or Amend). The court denied that motion on or about May 2, 2025. (Order Denying Motion to Alter or Amend). Appellants filed their Notice of Appeal on May 21, 2025. (Notice).

STANDARD OF REVIEW

"Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid." *Doe v. TCSC, LLC*, 430 S.C. 602, 607 (S.C. Ct. App. 2020) (citing *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013)). "Appeal from the denial of a motion to compel arbitration is subject to de novo review." *Berry v. Spang*, 433 S.C. 1, 7 (S.C. Ct. App. 2021) (citing *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008)). Following this standard of review, the lower court's factual findings will not be overruled if any evidence tends to reasonably support the findings. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

ARGUMENT

I. THE COURT ERRED IN CONCLUDING THE CONTROVERSY DID NOT ARISE UNDER OR IN CONNECTION WITH THE SPIFFY 3, LLC OPERATING AGREEMENT.

"Any doubts concerning the scope of arbitration should be resolved in favor of arbitration." *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Arbitration is to be ordered, "unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute." *Id*. (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)).

When assessing whether a claim falls within the scope of the arbitration agreement, the court's objective is to determine whether the claim has a "significant relationship to the… agreement" with the arbitration clause. *Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 496, 864 S.E.2d 391, 395 (Ct. App. 2021) (quoting *Zabinski v. Bright Acres. Assocs.*, 346 S.C. 580, 597-97, 553

S.E.2d 110, 118 (2001)). In *Zabinski*, the Supreme Court held any claim that is derivative of the partnership agreement is arbitrable when the agreement's arbitration clause provides "any controversy or claim arising out of the partnership agreement should be settled by arbitration." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119. The court further held "any tort claims between the partners that relate to the partnership agreement are arbitrable." *Id*.

The Spiffy 3, LLC Operating Agreement contains the Arbitration agreement at issue in this case. Under Paragraph 12.7 of the agreement, titled "Arbitration," reads as follows:

> Any dispute or controversy arising under or in connection with this Agreement shall be submitted to binding arbitration in accordance with the requirements of the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et seq. as then in effect ("SCUAA"). All arbitration proceedings shall be conducted in Charleston, South Carolina. The arbitrators shall be selected as provided in the SCUAA, and the arbitrators shall render a decision on any dispute within one hundred twenty (120) days after the last of the arbitrators has been selected. If any party to this Agreement fails to select an arbitrator with regard to any dispute submitted to arbitration under this Section, within thirty (30) days after receiving notice of the submission to arbitration of such dispute, then the other party shall select an arbitrator for such non-selecting party, and the decision of the arbitrators shall be binding upon all parties to the dispute, their personal representatives, legal representatives, heirs, successors and assigns. Each party to an arbitration proceeding under this Section shall pay an equal portion of all arbitrators' expenses and fees, together with other expenses of arbitration, except that the parties shall bear their own respective expert witness, professional and attorneys' fees.

(Spiffy OA at p. 21-22).

The first page of the Spiffy OA states each member, with valuable consideration, agrees to adopt the agreement in its entirety, to be the operating agreement of the company. (Spiffy OA at p. 1). In Paragraph 2.7 titled "Purposes," the Spiffy OA states the following: "[t]he character of business and purposes of the Company shall be to invest in and/or provide management services to one or more real estate development… including but not limited to managing, improving, investing, operating, leasing, mortgaging, refinancing, pledging, selling…". (Spiffy OA at p. 4; Transcript p. 16). The listed activities, along with any other that the members deem necessary or

appropriate, defines the scope of what company actions may be foreseeable, as furthered in detail under paragraph 2.8 "Powers." (Spiffy OA at p. 4-5). The second to last page of the Spiffy 3, LLC Operating Agreement contains the signatures of both Appellant Jewel and Respondent Pennoyer. (Spiffy OA at p. 23).

Here, with clear, unequivocal knowledge of the business purposes and plans for Spiffy, Respondent and Appellant Jewel expressly agreed in the Spiffy 3, LLC Operating Agreement to be bound to a broad arbitration clause. The arbitration clause broadly extends to "any dispute or controversy arising under or in connection with this agreement…" Pennoyer's Complaint incorporates and directly refers to the Operating Agreement in support of his claims for breach of the duty of loyalty, care, good faith, and fair dealing. His claims for gross negligence, corporate waste, accounting, and unjust enrichment are all derivative of the relationship created by the Operating Agreement, with the conduct arising from the "Powers" clause. (Transcript pp. 7-8). In paragraph 22 of the Amended Complaint Respondent alleges that this action is a derivative action under S.C. Code 33-44-1102. The cause of action for an accounting is based on another part of the Act, S.C. Code 33-44-408. (Amended Complaint para. 37; Transcript p. 9). As seen in *Zabinski*, if any torts claims share a relation to the operating agreement, they are arbitrable, where as here Pennoyer's claims are a direct result of the Operating Agreement's terms and the relationships it created. Even the claim denominated as a negligence cause of action arises under the operating agreement as it is essentially a claim that the Appellants were negligent when they permitted Uptown to sell property for less than fair value. (Amended Complaint para. 34; Transcript p. 9).

The trial court's reliance on whether Pennoyer could reasonably foresee the alleged misconduct at the time of the agreement is not supported by the Operating Agreement itself, which

defines the relationships of the parties and the powers each party holds. The record clearly shows that Pennoyer's claims are substantially related to the Spiffy 3, LLC Operating Agreement, requiring those claims to be submitted to arbitration as agreed to by both parties. In fact, Respondent attached copies of the Spiffy OA and the Uptown OA as exhibits to the Complaint which is further proof that his claims arise under and are based on those operating agreements. (Amended Complaint, Ex. A and Ex. B).

Despite the clear language of the Operating Agreement requiring arbitration and the claims alleged by Respondent that arise from that Operating Agreement, the Court declined to compel arbitration because the Court held that the acts alleged in the Complaint were not foreseeable. In reaching that conclusion the Court cited *Partain v. Upstate Auto Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) which cited *Aiken v. World of Fin, Corp.,* 373 S.C. 144, 644 S.E.2d 705 (2007). However, the Court's reliance on *Partain* was misplaced. In that case, the Plaintiff purchased a vehicle from Defendant and later filed a lawsuit alleging that he was the victim of a "bait and switch." *Id.*, at 490, 689 S.E.2d at 603. Defendants' motion to dismiss based on an arbitration agreement was denied and Defendant appealed that decision. *Id.* at 490, 689 S.E.2d at 603.

On appeal, the South Carolina Supreme Court affirmed the lower court based upon the reasoning that the courts would not interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. *Id.* at 494, 689 S.E.2d at 605. However, in reaching that conclusion the Court cautioned that:

> that this case should not be read as providing an 'end-run' around arbitration clauses. Where parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort. Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement.

Id. at 494-495, 689 S.E.2d at 605. Similarly, the Plaintiff in the Aiken case alleged a consumer fraud claim. *See Aiken v. World of Fin, Corp.*. 373 S.C. at 146, 644 S.E.2d at 706. Specifically, Plaintiff in that case alleged various torts arising from the misuse of his personal information by the Defendant. *Id.*

The critical substantive difference between the cases relied upon in denying the motion and this case is that Respondent does not allege any torts or other claims that could be characterized as consumer claims. Unlike the Plaintiffs in Partain and Aiken, Respondent is an experienced, sophisticated real estate professional, and his claim clearly arises from the Operating Agreement. Such claims would have clearly been in the contemplation of these parties at the time they agreed to arbitrate disputes. While Respondent presented one claim as a tort, the claims made are within the scope of the arbitration clause agreed upon. The Court should heed the cautionary words of the Partain case and prevent the Respondent from the attempt to "end-run" his commitment to arbitrate these claims.

II. THE COURT ERRED BY DENYING ARBITRATION ON THE GROUNDS THAT RESPONDENT WOULD NOT BE ALLOWED DISCOVERY AND MAY NOT BE ALLOWED TO ADD PARTIES.

Additionally, the order denying arbitration included an additional basis for denying arbitration that arbitration cannot "ensure all proper parties to this dispute are named in this action" and would not "afford Plaintiff the judicial process to conduct meaningful discovery." (Order Denying Motion to Dismiss or Compel Arbitration at p. 3). Those findings are not based on any citation of legal authority and Appellants are not aware of any legal authority for the proposition that a motion to compel arbitration may be denied because parties not named or identified in the Amended Complaint as parties may not be subject to arbitration. Further, there is no legal basis for denying arbitration just because the parties to the arbitration may not be permitted discovery

or may not permit discovery to the same extent as the South Carolina Rules of Civil Procedure. First, that finding is not based on any evidence in the record. Additionally, under S.C. Code Ann. Sec 15-48-80, discovery is contemplated and decisions about that are within the discretion of the arbitrations. That provision allows the arbitrators to issue (or cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing. Therefore, it was legal error to deny Appellants' motion to compel arbitration on those grounds and both the October 16th order and the May 2nd order denying Appellants' motion to alter or amend should be reversed for the reasons described more fully above.

CONCLUSION

Appellants respectfully request an order reversing the decision of the trial court and compelling this matter to arbitration pursuant to the parties' agreement.

Respectfully submitted,

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