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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Marvin H. Dukes, III, Circuit Court Judge
14th Judicial Circuit

Appellate Case No.: 2025-002327
Trial Court Case No.: 2025-CP-10-02139

Boris Van Dyck and Boris Van Dyck, LLC, Respondents,

v.

Woodlock Capital, LLC, Appellant.

RESPONDENTS' MEMORANDUM REGARDING PROPRIETY OF APPEAL

Respondents Boris Van Dyck and Boris Van Dyck, LLC ("Respondents") submit this Memorandum Regarding Propriety of Appeal as requested by the Court. Appellant Woodlock Capital, LLC ("Woodlock") took immediate appeal of the Order Denying Woodlock's Motion to Dismiss pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure entered on November 12, 2025 by the Honorable Marvin H. Dukes, III. For the reasons set forth below, Respondents believe this appeal is improper and untimely. As a result, it should be dismissed.

ISSUE PRESENTED

Is the lower court's order denying Woodlock's Motion to Dismiss under S.C. R. Civ. P. 12(b)(1), SCRCP, for lack of subject matter jurisdiction (the "Order") immediately appealable, where the circuit court determined that a purported arbitration provision was invalid and therefore

did not divest the circuit court of subject matter jurisdiction, without making any final ruling on the merits, rights, status or other legal relations of the parties?

RELEVANT FACTUAL BACKGROUND

The underlying dispute relates to a one-page document that related to the provision of "real estate consulting services" presented by Woodlock, a company not authorized or licensed under state law to provide real estate consulting services. The agreement, which related to a potential sale of two parcels of undeveloped land located in Goose Creek, South Carolina, does not meet the minimum requirements for an enforceable agreement to provide real estate services that are applicable under South Carolina law. Woodlock did not obtain a valid listing agreement with Respondents and did not act or participate as a broker in the sale of the underlying property when it was eventually sold to a third party. As a result, no payment was tendered to Woodlock. The Real Estate Consulting Fee Agreement identifies Woodlock as the "Broker," even though this entity is not a licensed or registered broker, was not acting as one, and violated S.C. Code § 40-57-135 through the use of improper documents. There is no stated duration, term, expiration date or time limitation on the Real Estate Consulting Fee Agreement. As a result, the duration is indefinite and perpetual. Under South Carolina law, "a listing agreement or buyer's representation agreement clearly must state that it terminates on the definite expiration date unless a written extension is signed." *See* S.C. Code § 40-57-135(I)(2)(h). Furthermore, the Real Estate Consulting Fee Agreement does not include a description or explanation of what specific services or duties that Woodlock would perform to earn the "consulting fee." This also violates South Carolina law, which requires that "a description of the agent's duties or services to be performed for the client including, but not limited to, an explanation of the office policy regarding dual agency, designated

agency, and transaction brokerage if offered by the real estate brokerage firm." *See* S.C. Code § 40-57-135(I)(2)(a).

A potential buyer sent a Letter of Intent to purchase the property via email to Woodlock. However, Woodlock failed to follow up or follow through with the potential purchaser. After the Letter of Intent expired without response, the potential buyer contacted Respondents to establish the buyer's interest in purchasing the property. Respondents and the buyer engaged in discussions and negotiations over the course of several months before ultimately agreeing to the terms of the sale. Woodlock did not participate in any way in the negotiations, due diligence, or closing of the property. Nevertheless, Woodlock issued an invoice to Respondents in the amount of $200,000.00, for the "consulting fee" purportedly due under the Real Estate Consulting Fee Agreement. Thereafter, Woodlock initiated an arbitration proceeding against Respondents based an arbitration provision embedded within the Real Estate Consulting Fee Agreement. The arbitration provision, which is in the same font, color, size, and type as the preceding paragraphs, states as follows:

> Unless otherwise agreed upon by both parties, any controversy or claim arising out of, or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered in a court having jurisdiction thereof and both parties agree to be bound by any such decision rendered.

The arbitration provision lacks the required language, placement, bolded type, and other requirements in order for a mandatory arbitration provision to be binding and enforceable on the parties under the South Carolina Uniform Arbitration Act ("SCUAA"). Also, the essential character of the transaction contemplated in the Real Estate Consulting Fee Agreement for the potential sale of undeveloped land – which is firmly planted in one State – does not satisfy the interstate commerce requirement under the Federal Arbitration Act ("FAA") to preempt the SCUAA's notice requirements.

Based on the deficiencies in the Real Estate Consulting Fee Agreement and Woodlock's underlying conduct, Respondents filed a declaratory judgment action in the action pending below. Woodlock moved pursuant to Rule 12(b)(1) to dismiss the action for lack of subject matter jurisdiction based on the patently invalid arbitration provision, which the circuit court denied. Woodlock immediately appealed to this Court from the Order that is not a final determination on the merits.

LEGAL ANALYSIS

I. The Order Does Not Involve the Merits.

"A circuit court order denying a motion to dismiss for lack of subject matter jurisdiction is not directly appealable because, among other things, it does not affect the merits." *See Allison v. W.L. Gore & Assocs*., 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). The South Carolina Supreme Court defines "an order which 'involves the merits,' as an order which 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" *See Mid-State Distributors, Inc. v. Century Importers, Inc*., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). "An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) (emphasis in the original), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code § 14-3-330. *See Woodard*, 319 S.C. at 242, 460 S.E.2d at 393. However, "an order denying a Rule 12(b)(1) motion to dismiss does not fall into any of these categories" and is "not immediately appealable." *Woodard*, 319 S.C. at 242–

43, 460 S.E.2d at 393–94 ("Because an order denying a Rule 12(b)(1) motion to dismiss does not fall into any of these categories, we hold that such orders are not immediately appealable").

In the action pending below, Respondents have alleged two causes of action pursuant to the Uniform Declaratory Judgments Act, S.C. Code §§ 15-53-10, *et seq*. The first declaratory judgment claim seeks an order from the circuit court declaring the arbitration provision of the Real Estate Consulting Fee Agreement invalid under the SCUAA for failure to meet the statutory notice requirements and declaring that Woodlock may not avail itself of the FAA's preemption for a transaction involving undeveloped acreage that is firmly planted within the boundaries of the State. *See Hicks Unlimited, Inc. v. UniFirst Corp*., 439 S.C. 623, 632, 889 S.E.2d 564, 568 (2023) (holding that "parties may not avail themselves of FAA preemption without satisfying 9 U.S.C. § 2's commerce requirement"). The second declaratory judgment claim seeks a determination of the parties' rights and obligations under the Real Estate Consulting Fee Agreement relating to compensation purportedly owed to Woodlock at the closing of the property. Specifically, Respondents are seeking a final determination as to the whether: (i) Woodlock is precluded from bringing any action against Respondents to recover a fee as the "Broker" under the Real Estate Consulting Fee Agreement because Woodlock does not hold a license with the South Carolina Real Estate Commission; (ii) Woodlock is entitled to receive payment for a "consulting fee" that is tied to the closing of the Property for which it has not obtained a written listing agreement as required under South Carolina law; and (iii) Woodlock acted as the broker for the transaction.

Woodlock filed a Motion to Dismiss pursuant to Rule 12(b)(1) in which it contended that the "arbitration provision is enforceable under the FAA because the contract involves interstate commerce" and the circuit court lacks subject matter jurisdiction to adjudicate the claims for declaratory judgment. A court's subject matter jurisdiction is determined by whether it has the

authority to hear the type of case in question. *See Allison*, 394 S.C. at 188, 714 S.E.2d at 549. South Carolina law recognizes that determinations regarding the validity of an arbitration clause are "a matter for the courts" and the question of the arbitrability of a claim is for "judicial determination." *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 609, 879 S.E.2d 746, 753 (2022) ("The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator"); *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (recognizing that "[t]he question of the arbitrability of a claim is an issue for judicial determination"). Thus, in ruling on Woodlock's Motion to Dismiss pursuant to Rule 12(b)(1), SCRCP for lack of subject matter jurisdiction, the circuit court determined the applicable law while leaving open questions of fact. The circuit court's finding that the invalid arbitration provision did not divest the circuit court of subject matter jurisdiction does not render the Order a final judgment. See Mid-State, 310 S.C. at 335, 426 S.E.2d at 780 ("If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.").

The Order's finding that the intrastate transaction did not trigger the application of the FAA and denying Woodlock's Rule 12(b)(1) motion is not a final, conclusive determination of the declaratory relief sought in the Complaint. The Order does not address the merits of the second cause of action for declaratory judgment relating to the commissions purportedly due to Woodlock under the Real Estate Consulting Fee Agreement. The rights of the parties have not been completely determined until the circuit court rules on the merits of the declaratory judgment claims. *See Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) (recognizing that a final judgment "must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination").

II. The Order Does Not Finally Determine or Affect a Substantial Right

Respondents anticipate that Woodlock will argue that the Order is immediately appealable based on the substantial right exception under S.C. Code § 14-3-330(2)(a) because the Order effectively forecloses Woodlock's defenses to the extent that they are premised upon a presumption that the arbitration provision is valid. The circuit court's finding that the FAA is inapplicable to the intrastate transaction does not convert the Order into one that is immediately appealable. While orders denying a motion to dismiss for lack of subject matter jurisdiction may involve a substantial right, "they do not fall under § 14–3–330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Woodard*, 319 S.C. at 243, 460 S.E.2d at 394.

Respondents also anticipate that Woodlock will attempt to argue that the Order is immediately appealable under Section 16 of the FAA, which provides that an order refusing to stay an action pending arbitration or compel arbitration is immediately appealable. *See* 9 U.S.C. § 16(a)(1). The circuit court denied the Motion to Dismiss based on its finding that the arbitration provision is ineffective and unenforceable as a matter of law without explicitly addressing the denial of Woodlock's motion, in the alternative, to stay the case and compel arbitration. Woodlock did not file a motion for reconsideration of the Order. The Order that Woodlock asks this Court to review is not an order denying a petition to compel arbitration – either by title or in substance. *See H&T Fair Hills, Ltd. v. All. Pipeline L.P.*, 154 F.4th 899, 902 (8th Cir. 2025) (finding that trial court's reconsideration order was not order denying petition to compel arbitration within the meaning of Section 16 of the FAA authorizing appeals from such orders and dismissing appeal in the absence of any authority indicating the mere existence of an arbitration agreement provides an automatic right of immediate appeal). In the instant appeal, the mere existence of the arbitration

provision contained in the Real Estate Consulting Fee Agreement, which does not mention or reference the FAA, does not provide an automatic right of immediate appeal.

III. Woodlock Lacks Standing to Appeal Under the FAA

Woodlock is not an aggrieved party under the FAA because the statute provides a remedy only where a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." *See* 9 U.S.C. § 4. The "central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms," and a party may not be forced to submit to arbitration absent express agreement. *See Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 872 (4th Cir. 2016) (*quoting Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 682 (2010)). The underlying document is not a valid contract or a valid arbitration agreement. Because the arbitration provision is ineffective and unenforceable as a matter of law, Woodlock is not "aggrieved" by Respondents' refusal to arbitrate the declaratory judgment claims. Woodlock cannot satisfy the statutory standing requirement for seeking relief under the FAA. Therefore, the Order is not immediately appealable under the provisions of the FAA.

CONCLUSION

For the reasons set forth above, the Order Denying Appellant Woodlock Capital, LLC's Motion to Dismiss pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure is not immediately appealable. Accordingly, Respondents Boris Van Dyck and Boris Van Dyck, LLC respectfully ask that the appeal be dismissed as improper and untimely.

Respectfully submitted,

By: *s/Ellis R. Lesemann*

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PROOF OF SERVICE

I, Ellis R. Lesemann, Esq., hereby certify that a true and correct copy of Respondents' Memorandum Regarding Propriety of Appeal was served upon counsel for Appellant in the above-captioned matter via email, this 4th day of December, 2025, addressed as follows:

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Respectfully submitted,

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