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THE STATE OF SOUTH CAROLINA
In The Court of Appeals
Appeal No. 2014-001216

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

Thomas A. Russo, Circuit Court Judge JUL 11 2014

Case No. 2013-CP-32-03007

SC Court of Appeals

Jeff Robert Sarokas,.....Appellant,

v.

Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor,.....Respondents,

PETITION FOR REHEARING

Appellant, Jeff Robert Sarokas, hereby petitions the Court to rehear or reinstate his appeal because the Court's Order, filed June 26, 2014, summarily dismissed it and was contrary to law. That Order improvidently granted Respondents' Motion to Dismiss, filed June 25, 2014. Appellant was denied the opportunity to brief the issues addressed by Respondents in their Motion to Dismiss prior to the issuance of the dismissal order.

The grounds for this petition are as follows:

- 1) The Order filed June 26, 2014 dismissed this appeal. Therefore, The Court may entertain this petition for rehearing. Rules 221(c) and 240(i), SCACR.
- 2) The following orders are under appeal:
 - a) the trial court's order that granted Respondents' motion to compel arbitration and dismissed the state court action pursuant to Choice Hotels Int'l, Inc. v.

BSR Tropicana Resort, Inc., 252 F.3d 707, 710, (4th Cir. 2001). That order is dated January 17, 2014. It is subsumed in the order dated April 28, 2014 denying Appellant's motion for reconsideration. It is attached to Respondents' Memorandum in Support of Motion to Dismiss, filed June 25, 2014, as Exhibit 4 and Exhibit 5-A.

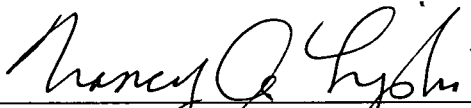
b) the trial court's order dated April 28, 2014 that denied Appellant's motion for reconsideration and reaffirmed the order dated January 17, 2014. It is attached to Respondents' Memorandum in Support of Motion to Dismiss, filed June 25, 2014, as Exhibit 6.

3) The issues presented by Respondents in their Motion to Dismiss, filed June 25, 2014, boiled down to whether or not the above orders were immediately appealable.

4) As discussed in Appellant's Rule 240(c)(2) memorandum, the Court overlooked the fact that the trial court dismissed the action when it granted Respondents' motion to compel arbitration. The Court therefore erroneously concluded that the orders were not immediately appealable.

5) Specifically, the orders under appeal were final and were immediately appealable under both state and federal law and procedure.

July 11, 2014



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PROOF OF SERVICE

I certify that I served the Petition for Rehearing of Appellant Jeff Robert Sarokas on Respondents Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2014, addressed to their attorney of record, Matthew K. Johnson, Post Office Box 2757, Greenville, South Carolina 29602.

July 11, 2014



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Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor,.....Respondents,

**MEMORANDUM IN SUPPORT
OF
PETITION FOR REHEARING**

July 11, 2014

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QUESTION PRESENTED

The question presented by Respondents in their Motion to Dismiss is:

WHETHER A TRIAL COURT'S ORDER GRANTING A MOTION TO COMPEL ARBITRATION AND THE DENIAL OF A RELATED MOTION TO RECONSIDER ITS DECISION ARE SUBJECT TO IMMEDIATE REVIEW BY THE COURT OF APPEALS?

However, the following better represents the question before the Court:

WHETHER TRIAL COURT ORDERS THAT: 1) DISMISS THE ACTION WHEN A MOTION TO COMPEL ARBITRATION IS GRANTED, AND 2) DENY A MOTION TO RECONSIDER ARE IMMEDIATELY APPEALABLE?

PROCEDURAL HISTORY

Appellant filed a lawsuit against Respondents in Lexington County Court of Common Pleas. It was based only on state law claims relating to the breach of his employment contract (called "Operating Partner Employment Agreement"). The Complaint is attached as Exhibit 1 to Respondents' Memorandum in Support of Motion to Dismiss, filed June 25, 2014 (hereinafter referred to as "Memorandum"). The employment contract is attached as Exhibit 2 to Respondents' Memorandum.

In his Complaint, Appellant independently challenged the validity and enforceability of the arbitration clause in his employment contract. *See*, Respondents' Memorandum, Complaint, Exhibit 1 at pp. 14-15.

Respondents filed a motion to compel arbitration premised on the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, *See*, Respondents' Memorandum, Exhibit 3.¹ The trial court held a hearing.² The trial court granted Respondents' motion to compel arbitration and specifically dismissed the state court action pursuant to Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 710, (4th Cir. 2001). *See*, Respondents' Memorandum, Exhibit 4 at p. 4; Exhibit 5-A at p. 4.

¹ At the same time, Respondents also filed an Answer and Counterclaim.

² The parties filed affidavits, memoranda, and supplemental memoranda to support their respective positions. Among other things, Appellant maintained that the parties contracted out of the Federal Arbitration Act because they agreed the employment contract would in all respects be governed by South Carolina law. As a result, only the South Carolina Uniform Arbitration Act ("SCUAA"), §§ 15-48-10 – 15-48-240, applied and Respondents failed to comply with its terms. In his memoranda and affidavit, Appellant refuted Respondents' interstate commerce contention and provided many examples of how his employment contract did not evidence a transaction involving interstate commerce; and, how the arbitration clause was unconscionably presented so as to force Appellant to enter into it; and, how arbitration was so prohibitively expensive that he would not pursue it because he could not afford it and therefore the arbitration clause was invalid and unenforceable under South Carolina law, among other things,

Appellant did not include his memoranda or affidavit as an exhibit because they go to the merits of the appeal and do not address the issues pending in this Petition for Rehearing. However, Appellant reserves the right to amend or supplement this Petition to include them.

Appellant filed a motion to reconsider which the trial court denied. *See*, Respondents' Memorandum, Exhibits 5 and 6.

ARGUMENT

1. The underlying orders are immediately appealable under S.C. Code Ann. §§ 14-3-330.

The Court, in its June 26 Order, dismissed this appeal based on Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 586 S.E.2d 581 (2003). However, that case did not discuss whether or not the underlying action was dismissed or stayed by the order compelling arbitration. Its reasoning relied heavily on Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995), a case in which the order compelling arbitration stayed the action. Where an order compelling arbitration stays the underlying action, the order is interlocutory and not final and cannot be appealed immediately. ("...the order...which stays this action and compels arbitration is not immediately appealable under (S.C. Code Ann.) § 15-48-200." Heffner at 136; "Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable (under the Federal Arbitration Act, 9 U.S.C. § 16(b)(1))." Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 87 n.2, 121 S.Ct. 513, 520 n.2, 418 L.Ed.2d 373 (2000)).

In a case of first impression decided six (6) years after Toler's Cove, the South Carolina Court of Appeals held that an order compelling arbitration that dismissed the underlying action was immediately appealable. Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct.App. 2009). According to Widener, South Carolina courts had not specifically addressed the issue of whether an order dismissing an action and compelling arbitration was immediately appealable. Relying upon Green Tree, *supra*, the Court of

Appeals held that dismissal of the action “finally determined the rights of the parties; therefore we have jurisdiction pursuant to section 14-3-330 of the South Carolina Code (Supp. 2007).” Widener at 174.

Respondents did not cite any case law to support their contentions in the first section of their Argument. The above cases refute their contentions and this Court’s reliance on Toler’s Cove which it misapplied because it is not applicable to this case.

The trial court specifically dismissed the underlying state court action based on Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 710, (4th Cir. 2001). *See*, Respondents’ Memorandum, Exhibit 4 at p. 4; Exhibit 5-A at p. 4. That case held that “dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.” Id. at 709-710.

2. The underlying orders are immediately appealable under the FAA.

Respondents’ Memorandum fails to discuss Green Tree, *supra*. That case held that an order compelling arbitration and dismissing the underlying claims is a final decision and is immediately appealable under the FAA. It specifically abrogated cases which relied on the embedded proceedings / independent proceedings analysis to determine if a decision was final.

An “embedded” proceeding involved both a request for arbitration and other claims for relief. An “independent” proceeding involved solely a request for arbitration. Green Tree at 88. Under cases cited by Respondents such as Humphrey v. Prudential Securities, Inc., 4 F.3d 313 (4th Cir. 1993), compelling arbitration in an “independent” proceeding was final whereas compelling it in an “embedded” proceeding was not even if the court dismissed all claims.

Green Tree eliminated the distinction and held that even in embedded proceedings a decision was final and immediately appealable if it compelled arbitration and dismissed all other claims. Therefore, Green Tree abrogated cases cited by Respondents such as Humphrey.

3. The underlying orders are immediately appealable under the SCUAA.

In a case of first impression decided six (6) years after Toler's Cove, the South Carolina Court of Appeals held that an order compelling arbitration that dismissed the underlying action was immediately appealable because it was a final order. Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172, 174 (Ct.App. 2009). See, Section 1 discussion, *infra*.

Additionally, Widener, held that SCUAA § 15-48-200, which sets forth a list of orders from which an appeal may be taken in arbitration cases, “does not preclude the order in this case from being immediately appealable” even though that list “does not include an order dismissing an action”. *Id.* at 173.

The Widener decision is controlling and logical. It allows Appellant to appeal a decision of the trial court which dismissed the underlying action because it determined that all claims were arbitrable (hence there was no need for the trial court to issue a stay). It allows this Court to determine the merits of his appeal which independently challenges the validity and enforceability of the arbitration clause for many reasons, one of which is its expense which is so prohibitive that Appellant would not be able to pursue arbitration because he could not afford it. See, footnote 2, *infra*.

Reliance on Toler's Cove, which is misplaced as stated above, effects an injustice. It leaves Appellant with legal rights (i.e. claims) but no remedy (i.e. no litigation and no

arbitration because he cannot afford it). Even, *assuming arguendo*, Appellant could afford arbitration, it would require him to exhaust that remedy and incur that expense, only to appeal the trial court's decision compelling the arbitration wherein he would after-the-fact contest the validity and enforceability of the arbitration clause. Even if Appellant were then victorious on appeal, it would be at tremendous cost – both in terms of financial expense and time delay. Public policy supporting a speedy and economical resolution would be defeated.

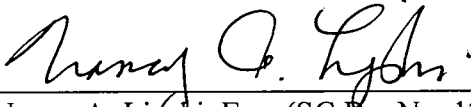
CONCLUSION

Appellant respectfully requests that the Court grant his petition for rehearing and reinstate his appeal so that the Court may address its merits. Appellant respectfully requests that the Court grant him such other and further relief as is just and proper including, if applicable, fees and/or costs.

Due to the schedule of Appellant's counsel (who received the Order of this Court the day she was to start a long-planned vacation from which she returned four (4) days before this Petition had to be filed), Appellant respectfully requests additional time for briefing the issues and/or a hearing en banc.

Respectfully submitted,

July 11, 2014



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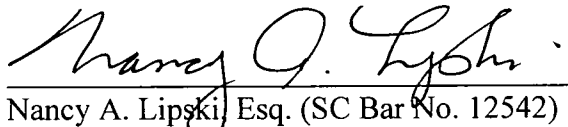
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