

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2013-CP-32-03007

Robert Jeff Sarokas, Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

July 18, 2014

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ARGUMENT

Appellant's Petition for Rehearing in essence argues this Court "overlooked the fact that the trial court dismissed the action [rather than granting a stay] when it granted Respondents' motion to compel arbitration" and, therefore, "erroneously concluded that the orders [granting Respondents' motion to compel arbitration and, subsequently, denying Appellant's motion to reconsider] were not immediately appealable." Appellant's Petition for Rehearing at 2. Appellant's Memorandum in Support of Petition for Rehearing tracks the three main points from Respondent's Memorandum in Support of Motion to Dismiss Appeal in its "Arguments" section, but drawing the opposite conclusions.

Appellant argues the underlying orders are immediately appealable under: (1) S.C. Code Ann. § 14-3-330; (2) the Federal Arbitration Act, 9 U.S.C. §§ 1-307 ("the FAA"); and (3) the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10-15-48-240 ("the SCUAA"). As evidenced in Respondent's Memorandum in Support of Motion to Dismiss Appeal, and as shown in the Order at issue, this is not the case. Further, Appellant's arguments do not show that this Court's reliance on *Toler's Cove Homeowners Assoc., Inc., v. Trident Constr. Co., Inc.*, 586 S.E.2d 581 (S.C. 2003), in its Order dismissing this appeal suggests it "overlooked" the fact the trial court *dismissed* the underlying claims in favor of arbitration rather than granting a *stay*.

1. **The underlying orders are not immediately appealable under S.C. Code Ann. § 14-3-330.**

Appellant suggests this Court's underlying order was improper because it relied on *Toler's Cove*, which "did not discuss whether or not the underlying action was *dismissed or stayed*." Petition for Rehearing at 9 (emphasis added). Appellant's argument also appears to rely upon *Heffner v. Destiny, Inc.*, 471 S.E.2d 135 (S.C. 1995). Appellant's reliance upon these cases in this fashion is misplaced.

In *Toler's Cove*, the South Carolina Supreme Court specifically held, as noted in this Court's Order, that South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA, applies and, therefore, the order compelling arbitration is not immediately appealable. *Toler's Cove*, 586 S.E.2d at 584–585. The issue in *Toler's Cove* was principally whether the FAA or SCUAA applied in making this determination where there was no choice of law provision. *Id.* at 584.

Further, unlike the present case, the arbitration agreement in *Toler's Cove* contained a conspicuous notice on the first page of the agreement stating that it was subject to arbitration under S.C. Code Ann. § 15-48-10. *Id.* at 583. This is not the case here, where the parties' arbitration agreement lacks reference to the SCUAA. Regardless, because South Carolina state procedural rules are not preempted by the FAA, the trial court's decision to grant Respondent's Motion to Compel Arbitration, and to deny Appellant's

subsequent Motion for Reconsideration, are not immediately appealable in either circumstance.

Appellant refers to *Heffner* and its reasoning as applied in *Toler's Cove*. In *Heffner*, the South Carolina Supreme Court noted that an appeal may only be taken from a specific, limited group of circumstances under South Carolina Code Ann. § 15-48-200(a). *Heffner*, 471 S.E.2d at 136. A scenario where a trial court grants a motion to compel arbitration, whether in the context of a dismissal or a stay, is not among those enumerated instances. Indeed, the South Carolina Supreme Court, applying the rule of statutory construction "*expressio unius est exclusio alterius*" (the mention of one is the exclusion of another), determined all other orders related to arbitration are not immediately appealable. *Id.*

Appellant also cites to *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 87, n.2 (2000), to suggest the trial court's order dismissing his case in favor of arbitration is immediately appealable because there was no stay. Petition for Rehearing at 9. However, *Toler's Cove* was decided after *Randolph* and specifically stated that *Heffner*, which was overturned to the extent it limits appealability when the federal statute applies, remains authoritative with respect to South Carolina state procedural law precluding the immediate appeal of an order compelling arbitration. *Toler's Cove*, 586 S.E.2d at 584, n.3. Further, *Randolph* is dissimilar—the question presented there had to do with appealability under the UAA, whereas *Toler's Cove*

involved appealability under the state statute where the parties' arbitration agreement does not otherwise provide for choice of law.

Finally, Appellant cites *Widener v. Fort Mill Ford*, 674 S.E.2d 172 (S.C. App. 2009), to suggest the court's reliance on *Toler's Cove* was misplaced. At most, *Widener* would suggest that the trial court's appropriate actions would have been to stay the underlying action. In *Widener*, this Court's decision-making appears to have been influenced by potential statute of limitations concerns. *Widener*, 674 S.E.2d at 174. As such, this Court did not address the propriety of the trial court's decision-making on the arbitrability issue. It merely reversed the decision of the trial court and remanded it for the trial court to vacate its dismissal and for entry of an order staying the action pending arbitration proceedings. *Id.* Accordingly, the substantive question of arbitrability was not reached in either scenario. Rather, the parties were required to proceed to arbitration consistent with their written arbitration agreement, and that should be the case here.

2. The underlying orders are not immediately appealable under the FAA.

Appellant's reference to *Green Tree Fin. Corp.-Ala. v. Randolph* in this context is inconsistent with his argument above given that it is inconsistent with *Toler's Cove* and *Heffner* where they argue the SCUAA applies, rather than the FAA, as the appropriate procedural rule in determining whether compelling arbitration is immediately appealable. *See, Toler's Cove*, 586 S.E.2d at 584; *Heffner*, 471 S.E.2d at 136. Under South Carolina law, the

trial court's underlying orders favoring arbitration are not immediately appealable, consistent with *Toler's Cove*, *Heffner*, and *Widener*.

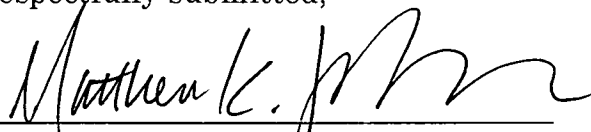
3. The underlying orders are not immediately appealable under the SCUAA.

Finally, Appellant's third argument essentially restates his argument concerning arbitrability under S.C. Code Ann. § 14-3-330 and *Widener* from Section 1 above. Again, even if *Widener* is controlling in this instance, it does not preclude arbitration of Appellant's claims. It merely suggests an additional step in the process so as to avoid a potential statute of limitations concern. At most, *Widener* suggests remanding for the trial court to vacate its previous order and staying the underlying lawsuit pending arbitration proceedings. However, neither *Widener* nor any applicable statutory or common law cited by Appellant allows this Court to "determine the merits of his appeal" as he suggests. Petition for Rehearing at 11.

CONCLUSION

For the foregoing reasons, the Court should deny Appellant's Petition for Rehearing because the orders granting Respondent's Motion to Compel Arbitration and denying Appellant's Motion to Reconsider are not subject to immediate appeal. In the alternative, this Court should at most remand to the trial court consistent with *Widener*, for it to vacate its dismissal of Appellant's claims in favor of arbitration and for the trial court to enter an order staying the underlying lawsuit pending the outcome of arbitration proceedings between the parties.

Respectfully submitted,



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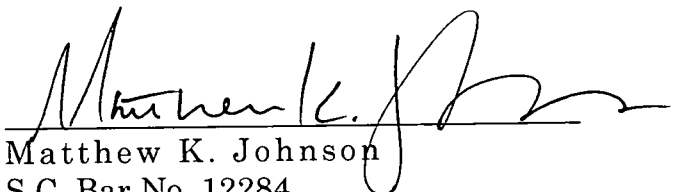
Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor, Respondents,

PROOF OF SERVICE

I certify that I have served the Memorandum in Support of Motion to Dismiss of Respondents Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor on Appellant Jeff Robert Sarokas by sending to his attorney of record a copy of the same via first class mail, properly addressed, postage prepaid at the following address:

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