

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

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JUL 25 2014

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Thomas A. Russo, Circuit Court Judge

Case No. 2013-CP-32-03007

Jeff Robert Sarokas,.....Appellant,

v.

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

REPLY TO
RETURN TO PETITION FOR REHEARING

July 25, 2014

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ARGUMENT

Respondents discount the significance of the following important points:

1) Appellant independently challenged the existence, validity, and enforceability of the arbitration agreement. Appellant's challenges were overruled by the trial court's orders which dismissed the action and compelled arbitration. The trial court's orders thereby deprived Appellant of his constitutional right to a jury trial and thereby affected a substantial right as well as the mode of trial.

2) the trial court's orders dismissed the action pursuant to Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707 (4th Cir. 2001) which requires dismissal (and not a stay) when all claims are arbitrable, as the trial court determined them to be in this case.

3) Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 586 S.E.2d 581 (2003) did not address any of the above.

4) Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct.App. 2009) allowed the appeal of an order that dismissed the action but the appeal did not involve a challenge to the validity of an arbitration agreement. The Widener Court held that a stay was appropriate for reasons that are not related to this case.

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

Plaintiff's Complaint is based on contract. It is an action at law. Appellant had a constitutional right to a jury trial. Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct.App. 2004); S.C. Const. Art. I, § 14. In his Complaint, Appellant specifically requested a jury trial. *See* Respondents' Motion to Dismiss Memorandum filed June 24,

2014, Complaint, Exhibit 1.¹

In his Complaint, Appellant specifically challenged the validity and enforceability of the arbitration clause. Among other reasons, Appellant alleged that the parties' agreement provided that South Carolina law governed it "in all respects"; and, because the agreement was "in all respects subject to, and governed by, the laws of the State of South Carolina" only the South Carolina Uniform Arbitration Act ("SCUAA"), §§ 15-48-10 – 15-48-240, S.C. Code of Laws applied and Respondents failed to comply with its terms and the agreement therefore was invalid and unenforceable and thereby did not exist "in the first place." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). *See*, Respondents' Memorandum, Complaint, Exhibit 1, paragraphs 110 through 113, at pp. 14-15.

Appellant also alleged that the arbitration clause was unconscionable which too brought into question whether the arbitration agreement "even existed in the first place". Simpson at 668. If a court determines that an agreement to arbitrate does not exist, then arbitration will be denied. Id. at 669. If arbitration is allowed, the obvious result is the loss of a right to a jury trial. Id. at 670.

Therefore, when the trial court dismissed the action and compelled arbitration, it effectively prohibited Appellant from exercising his constitutional right to a jury trial and affected the mode by which his claims would be tried and resolved. Consequently, the underlying orders were immediately appealable. § 14-3-330(2) S.C. Code Ann.;

Bateman, supra.; Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant

¹ Civil Action Coversheet: "JURY TRIAL demanded in complaint" checked.
Summons: "JURY TRIAL DEMANDED" stated in the caption.
Complaint: "JURY TRIAL DEMANDED" stated in the caption on page 1.

Respondents' Motion to Dismiss Memorandum filed June 24, 2014 is hereafter referred to as "Respondents' Memorandum".

failed to timely appeal an interlocutory order referring the dispute to the master in equity, appellant waived his right to a trial by jury).

Toler's Cove did not discuss any of the above and is, therefore, inapplicable to the facts of this case.

Respondents, in their Return, downplay the significance of Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct.App. 2009) and misstate its holding. 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. This Court, in Widener, held that dismissal of the action was a final order and this Court had jurisdiction pursuant to § 14-3-330 to hear the appeal. Widener at 174. The Court then addressed the statute of limitations, an issue raised in the appeal that warranted staying the action. This Court agreed that a stay was warranted because the arbitrator was the one to determine the arbitrability of the claims (e.g. whether or not some or all of the claims could be litigated and not arbitrated). If the arbitrator determined that they could be litigated, then those claims would be time-barred by the dismissal and a stay would preserve them. But that is not the case here. The trial court already determined that all of the claims in this action were arbitrable. Therefore, the Widener Court's reasoning for staying the action is inapplicable and this Court may address the merits of Appellant's appeal. That outcome is consistent with Choice Hotels, supra, which held that when the trial court determines that all claims are arbitrable, the court action should be dismissed.

Also, it should be noted that in Widener, unlike the present case, no issue was presented regarding the appellant being deprived of his constitutional right to a jury trial

and the dismissal orders thereby affecting a substantial right as well as the mode of trial, all of which provide for an order to be immediately appealable under § 14-3-330.

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

This section of Respondents' Return is somewhat confusing. In their Motion to Dismiss, Respondents argued that the underlying orders were not immediately appealable under the Federal Arbitration Act, 9 U.S.C. §§ 1-307 ("FAA"). Appellant, in his Memorandum Supporting his Petition for Rehearing, filed July 11, 2014, merely refuted Respondents' arguments and showed how they were outdated and how the cases they cited had been abrogated by Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513, 418 L.Ed.2d 373 (2000). Appellant contends that the FAA is not applicable because the parties contracted out of it. Simpson, supra. As the South Carolina Supreme Court stated in Simpson:

Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. Munoz v. Green Tree Fin. Corp., Simpson at 667. (Emphasis added).

Additionally, Appellant contends that the FAA is not applicable because the parties' contract did not evidence a transaction involving interstate commerce.

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

Respondents argue that this Court, at most, should allow the appeal under Widener, but remand to the trial court to vacate its orders and stay the action instead of dismissing it. However, as discussed above, that outcome is inconsistent with Widener

and Choice Hotels because the trial court already determined that all claims were arbitrable. The issue of arbitrability was for the trial court to determine, not the arbitrator. Neither Appellant nor Respondents contested that matter.

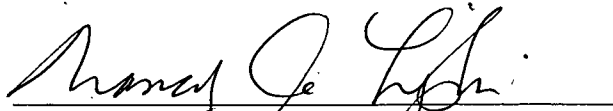
Moreover, as stated above in sections 1 and 2, the SCUAA governs because the parties contracted that their agreement was “in all respects subject to, and governed by, the laws of the State of South Carolina”. Under the SCUAA, the trial court determines arbitrability.

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.

Appellant respectfully requests additional time for briefing the issues and/or a hearing en banc.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the Reply to Return to 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 25, 2014, addressed to their attorney of record, Matthew K. Johnson, Post Office Box 2757, Greenville, South Carolina 29602.

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