

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

OCT 07 2015
SC Court of Appeals

Case No. 2012-CP-10-8135

Karen Oliver, Appellant,

v.

Amanda Lawrence and Trident United Way, Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an appeal from a Circuit Court order dismissing a breach of contract and defamation action on the basis of a prior arbitration proceeding and the subsequent lack of subject matter jurisdiction in the Circuit Court.

The Appellant Karen Oliver was hired on August 30, 2010, by AmeriCorps and was assigned to work with the Respondent Trident United Way as part of its Financial Stability Project. On that same date, the Appellant entered into an agreement with the Trident United Way which provided for grievances procedures and, if requested by the grievant, binding arbitration. (R. 27-29).

On December 15, 2010, the Appellant was terminated from the program. Following her termination, the Appellant pursued her rights through the grievance process, resulting in a decision upholding her termination. Thereafter, the Appellant requested binding arbitration. (R. 31).

James L. Bell of the Bell Law Firm was appointed as the arbitrator. The arbitration hearing was scheduled for June 23, 2011, and the arbitrator provided notice of that hearing to the Appellant by letter dated June 1, 2011. (R. 32). The notice included that the date, time, and location of the hearing, and was mailed to the Appellant's correct mailing address. (R. 32). In addition, the arbitrator attempted to confirm the Appellant's appearance by telephone. (R. 39). The

Appellant did not appear for the arbitration hearing. (R. 39). On October 7, 2011, the arbitrator issued his decision in favor of Trident United Way. (R. 39-42).

More than one year later, on December 18, 2012, the Appellant filed a civil lawsuit in the Circuit Court alleging causes of action for breach of contract and defamation against the Respondents Trident United Way and Amanda Lawrence. (R. 125-132). Lawrence was the Trident United Way Director of Financial Stability and AmeriCorps Program Director.

In response, the Respondents filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCF, wherein the Respondents argued that "[t]he Complaint should be dismissed pursuant to Rule 12(b)(1), SCRCF, because Plaintiff's claims were previously adjudicated by binding arbitration and this court, therefore, lacks subject matter jurisdiction." (R. 24). The Respondents further maintained that "Plaintiff's claims were addressed and ruled on in the initial grievance hearing, and at the subsequent binding arbitration held on June 23, 2011." (R. 24).

The Respondents' motion to dismiss was heard by Circuit Court Judge J.C. Nicholson, Jr. on May 13, 2013. (R. 54-68). Judge Nicholson issued an Order filed May 31, 2013, granting the motion to dismiss for lack of jurisdiction due to the binding arbitration. He also ruled alternatively that the defamation claim was barred by the two year statute of limitations pursuant to S.C. Code Ann. § 15-3-550. (R. 2-5).

The Appellant then filed a motion for reconsideration. Judge Nicholson issued an Order filed August 30, 2013, denying that motion, but ultimately that Order was vacated. (R. 7, 9). The motion for reconsideration was then set for a hearing on October 9, 2013. Following that hearing, Judge Nicholson determined that the notice of the arbitration hearing provided to the Appellant by the arbitrator was proper. Judge Nicholson accordingly denied the motion for consideration by Order filed October 18, 2013. (R. 11-14).

The Appellant thereafter filed a notice of appeal, and this appeal followed.

ARGUMENTS

I. The Appellant has made no showing that the Circuit Court treated her unfairly or failed to provide her the opportunity to fully and fairly litigate the motions adjudicated.

As her initial issues on appeal, the Appellant Karen Oliver has asserted various ways that she contends that Circuit Court Judge J.C. Nicholson, Jr. treated her unfairly during the course of the October 9, 2013 hearing on her motion for reconsideration. Specifically, the Appellant complains that Judge Nicholson did not permit "equitable use" of courtroom facilities and allowed the Respondents' counsel to estimate the time that the motion would need to be heard. She further claims that Judge Nicholson deliberately misapplied Rule 59(g) to intimidate her. The Appellant also complains that Judge Nicholson refused her submission of supplemental exhibits. Finally, she complains that Judge Nicholson denied her any opportunity for rebuttal argument. None of these complaints have any merit nor had any bearing on the ultimate dismissal of her action on the merits and thus do not constitute reversible error.

First, with respect to the Appellant's claim that Judge Nicholson did not permit "equitable use" of courtroom facilities, the Appellant's own recitation of the events shows that Judge Nicholson was attempting to make the best use of the court time and not inconvenience any litigants. Apparently, there was a lengthy motion hearing

scheduled ahead of the Appellant's case on the motions docket. Judge Nicholson inquired as to the approximate amount of time that Appellant's motion would take, and based on that response, he decided to take the Appellant's motion first. He clearly did this as a courtesy to the Appellant and the Respondents' counsel. The Appellant complains that other attorneys already had their files on counsel table where she was to sit, but she has not shown how that prevented her from being able to properly present her motion and legal arguments.

Next, the Appellant complains that, once the hearing began, Judge Nicholson deliberately misapplied Rule 59(g) to intimidate her. That is not supported in the record. In fact, the record reflects that Judge Nicholson simply inquired of the Appellant regarding her compliance with Rule 59(g) and ultimately accepted her explanation that she had complied with the rule when she provided an extra copy of her motion for reconsideration to the Clerk of Court to be placed in Judge Nicholson's box in the Clerk's Office. (R. 56-58). When the Respondents' counsel attempted to present argument on the Rule 59(g) issue, Judge Nicholson, in fact, immediately responded as follows:

THE COURT: Well, I will take her by her word that she provided a copy by filing it in the clerk's office and putting it in my box downstairs. I'll accept that as she provided me with a document, okay?

MS. FARGNOLI: Fair enough.

THE COURT: Obviously it would have been a lot better if she would have sent that. I'll accept that, okay. If that's what she did, I'll take her word for it.

(R. 64-65). Consequently, Judge Nicholson ruled in the Appellant's favor and accepted that she had sufficiently complied with Rule 59(g). There is no indication that Judge Nicholson misapplied Rule 59(g) or attempted to intimidate the Appellant. In short, the Appellant can show no error or prejudice that resulted.

Moreover, the Appellant complains that Judge Nicholson refused her submission of supplemental exhibits. There is no support for that in the record. During the October 9, 2013 hearing, the Appellant informs Judge Nicholson that she had filed certain "documentation." (R. 61). Judge Nicholson did not make any ruling at that point or thereafter excluding those additional exhibits. Instead, the Order that was subsequently issued explains that "the Court heard arguments from both sides and has reviewed the pleadings, motions, memoranda, and exhibits filed with the Court." (R. 11).

Additionally, the Appellant cannot show any prejudice even if the supplemental exhibits had been rejected, as the Appellant appears to contend. In her brief, the Appellant argues that those exhibits were intended to prove the merits of her claims for defamation and breach of contract. However, Judge Nicholson dismissed the Appellant's Complaint for lack of subject matter jurisdiction and because her claims were heard in arbitration. He further dismissed the defamation

claim based on a statute of limitations defense. The additional exhibits do not demonstrate that those rulings were in error.

Finally, the Appellant complains that Judge Nicholson did not allow her an opportunity to rebut the Respondents' arguments. In particular, she now insists that she should have been able to rebut Respondents' counsel's claim that there is no "new evidence." However, the colloquy between Judge Nicholson and Respondents' counsel reflects that Judge Nicholson was focused on the issue of the proper method of service for the notice of the arbitration hearing. He indicated that his decision would turn on that issue, which is ultimately how the motion for reconsideration was resolved. (R. 66-67). The Appellant's claims were not decided based on the sufficiency of her proof, and thus she was not prejudiced by the inability to rebut Respondents' counsel's claim that there was not any "new evidence." As the record reflects, Judge Nicholson actually tried to assist the Appellant by raising a legal issue she had not raised, although ultimately he determined that proper notice under the Federal Arbitration Act had been provided.

In sum, the Appellant has not shown that Judge Nicholson violated any "due process" rights as she claims. The record does not support her contention that she was treated unfairly by Judge Nicholson during the October 9, 2013 motion hearing. Likewise, the Appellant has not shown any prejudice that would require a new hearing on her motion for reconsideration.

II. The Circuit Court correctly ruled that the Appellant's claims were subject to binding arbitration and were fully and finally adjudicated by the decision of the arbitrator.

In Section V of her opening brief, the Appellant attempts to litigate the merits of her lawsuit against the Respondents. However, in doing so, the Appellant disregards the fact that Judge Nicholson never reached the merits but rather dismissed her Complaint because her claims were subject to binding arbitration under the agreement between the Appellant and the Trident United Way. Because her claims were subject to binding arbitration, which she does not dispute, Judge Nicholson determined that the Circuit Court lacked subject matter jurisdiction. *See, Plaza Development Services v. Joe Harden Builder, Inc.*, 296 S.C. 115, 370 S.E.2d 893, 895 (Ct. App. 1988) ("It was proper for the court to dismiss the action under Rule 12(b)(1), since federal law requires Plaza to arbitrate its claims against Harden").

In reviewing the Appellant's appeal, it is not immediately clear that she is even challenging Judge Nicholson's dispositive rulings. Judge Nicholson determined that the agreement between the parties did require binding arbitration. (R. 4). He further found "that Plaintiff has raised the same claims in this action as those that were previously adjudicated at the binding arbitration and/or should have been adjudicated at the arbitration." (R. 4). Finally, he concluded that "the Plaintiff was given proper notice of the arbitration hearing." (R. 4).

Later, in resolving the Appellant's motion for reconsideration, Judge Nicholson further determined that the notice of the arbitration hearing by regular mail was sufficient because the arbitration was governed by the Federal Arbitration Act.

Judge Nicholson wrote:

Because the Agreement is governed by the FAA, there was no requirement that Plaintiff be served with notice of the hearing by personal service or registered mail. Plaintiff was served by regular standard mail at 1945 Ghana Street, Johns Island, South Carolina 29455, which Plaintiff concedes is the correct address. This was adequate notice under the FAA. Accordingly, Plaintiff's Motion to Reconsider is denied because she received adequate notice of the arbitration hearing and the claims raised by Plaintiff have been arbitrated and ruled upon:

(R. 14). The Appellant has not challenged this ruling on appeal, and it is therefore the law of the case. *See, ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997) (a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct).

The Appellant appears to argue instead that the Respondents breached the parties' agreement by failing to follow certain procedures with respect to the grievance and arbitration process and in presenting inadmissible evidence to the arbitrator. However, those procedural and evidentiary issues are subject to and should have been raised as part of the arbitration process. As Judge Nicholson

determined, the Appellant was required to litigate by way of binding arbitration not only those claims actually adjudicated at the binding arbitration but also those claims or issues that could have been adjudicated at the arbitration. (R. 4). Those procedural and evidentiary objections that the Appellant is raising in her appeal are precisely the types of issues that should have been presented to and ruled upon with finality by the arbitrator.

Although he dismissed the Appellant's Complaint under Rule 12(b)(1) on the basis of lack of subject matter jurisdiction, Judge Nicholson also recognized, as discussed above, that the Appellant's claims were litigated or should have been litigated as part of the binding arbitration which had already been completed. In essence, Judge Nicholson relied on the doctrine of *res judicata* as an additional basis for dismissal. This Court's decision in *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003), appears directly on point. In that case, the plaintiff had asserted a number of causes of action which the defendant contended had previously been resolved as part of a binding arbitration. This Court ultimately affirmed based on the doctrine of *res judicata*. Specifically, this Court noted that "an arbitration is a final award on the merits." 593 S.E.2d at 485. The Court also reaffirmed that an arbitration award is entitled to preclusive effect and that *res judicata* applies not only to claims or issues actually litigated in the arbitration proceeding but also to claims or issues that could have been litigated. Interestingly, in *Palmetto Homes*, the plaintiff argued that his civil action should not be barred by

the arbitration award because he did not actually participate in the arbitration proceedings. This Court disagreed and ruled that the plaintiff's "failure to participate in the proceedings did not preclude its claims from being submitted to the arbitration proceeding." *Palmetto Homes*, 593 S.E.2d at 485. This Court thus applied *res judicata* and affirmed the Circuit Court's dismissal on that basis.

This case is no different. Here, the Appellant requested binding arbitration. She received proper notice of the arbitration hearing and did not appear, despite the efforts of the arbitrator to contact her. The arbitrator thereupon conducted the hearing and ruled in favor of the Respondents. That arbitration award is entitled to preclusive effect. As Judge Nicholson recognized, the Appellant is properly precluded from re-litigating in her civil action any claims or issues previously adjudicated in the arbitration as well as any claims or issues that could have been adjudicated by the arbitrator. (R. 4). Therefore, consistent with the result in *Palmetto Homes*, the Appellant's Complaint was properly dismissed on that basis. That includes all procedural and evidentiary issues that the Appellant now attempts to litigate as part of her breach of contract claims as well as her defamation claim.

In sum, as correctly determined by Judge Nicholson, the Appellant's claims and issues that were litigated or should have been litigated as part of the binding arbitration process were properly dismissed.

III. The Circuit Court correctly dismissed the Appellant's defamation claim on the additional basis that the claim was untimely.

As an additional basis, Judge Nicholson also granted the Respondents' motion to dismiss the Appellant's defamation claim based upon the expiration of the statute of limitations. As Judge Nicholson correctly found, the Appellant alleges that defamation resulted from a facsimile transmission sent on November 30, 2010, which is further described in a December 18, 2010 letter prepared by the Appellant as "malicious, deceptive, damaging information that was false in regards to me." (R. 33). The two-year statute of limitations for libel and slander therefore expired on November 30, 2012. *See*, S.C. Code Ann. § 15-3-550. Yet, the Appellant did not file her Complaint until December 18, 2012, which was after the statute of limitations had elapsed. (R. 125).¹ Judge Nicholson therefore correctly ruled that the statute of limitations barred the defamation claim.

IV. The Appellant has failed to show any reversible error occurred as a result of the issues raised regarding the preparation of the transcript of the October 9, 2013 motion hearing.

The Appellant is also challenging the accuracy of the transcript of the October 9, 2013 motion hearing that she received from the court reporter, Mona Manley. The

¹ The Appellant cannot claim the benefit of the discovery rule. As this Court has ruled, "South Carolina has not adopted the discovery rule in libel and slander cases." *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770, 775 (Ct. App. 1997).

Appellant's issues with respect to the transcript have already been presented to and rejected by this Court in adjudication of several motions filed by the Appellant. (R. 18, 20). There is no basis for the relitigation of those rulings.

In summary, the record reflects that the Appellant has been informed by letter from Court Administration that there is a procedure as set forth in the South Carolina Court Reporter Manual for a challenge to the accuracy of a transcript. That procedure is as follows:

When there is a challenge to the accuracy of a transcript, the court reporter will respond to the challenger in writing. The court reporter will then review the record and report the findings in writing to the challenger, with a copy to all parties and Court Administration. Any inaccuracies will be corrected and the pages forwarded to the challenger at no cost. Further review of the record may be permitted by the presiding judge upon written request with good cause shown.

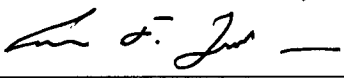
The court reporter timely responded to the Appellant's initial request by confirming the accuracy of the transcript as prepared. Upon information and belief, the Appellant has never made a written request to Judge Nicholson nor made any showing of "good cause." Furthermore, it is apparent that the Appellant's "specific challenges" to the transcript, even if accurate, are inconsequential and have no material effect on this appeal and the legal issues as asserted. At any rate, the issues that the Appellant raises with respect to the transcript serve as no basis for the reversal of Judge Nicholson's ultimate adjudication of this case or for a rehearing on the Appellant's motion for reconsideration.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the Orders issued by Circuit Judge J.C. Nicholson, Jr. dismissing the Appellant's Complaint and denying her motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

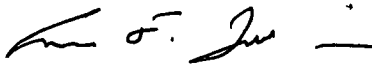
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The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon the *pro se* Appellant and all other counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 7th day of October 2015:

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