

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Master of Equity
Honorable Charles B. Simmons, Jr.

Appellate Case No. 2016-001576

CACV of COLORADO, LLC

v.

Robert H. Bishop,

INITIAL BRIEF OF APPELLANT

William H. Thomas, III
S.C. Bar 05537
P.O. Box 10498
Greenville, SC 29603-0498
864-298-0064
Attorney for Appellant

Edward H. Overcash, Jr.
37 Villa Road, Suite 507
Greenville, SC 29615
864-298-1110
Attorney for Respondent

RECEIVED

OCT 24 2016

SC Court of Appeals

Respondent,

Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORTIES.....	4
INTRODUCTION.....	5
STATEMENT OF ISSUES ON APPEAL.....	5
STATEMENT OF THE CASE.....	5
STANDARD OF REVIEW.....	6
ARGUMENT.....	7

TABLE OF AUTHORITIES

Cases

<i>Davis v. KB Home of South Carolina, Inc.</i> , 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011).....	6
<i>FIA v Weaver</i> , 62 So.3d 709 (La. S.C. 2011).....	passim
<i>Gatling v Beach Palace, Inc.</i> , 294 S.C. 464, 365 S.E. 2d 736 (Ct. App. 1988)	10, 11
<i>Hutto v. CACV</i> , 308 Ga. App. 469 (2011).....	9, 11
<i>MBNA America National Bank, NA v. Christianson</i> , 659 S.E. 2d 209, 377 S.C. 210 (S.C App., 2008).....	passim
<i>MBNA v. Credit</i> , 281 Kan. 655 (2006).....	10
<i>McDaniel v. U.S. Fidelity and Guarantee Co.</i> 324 S.C. 639, 478 S.E.2d 868 (S.C. App. 1999).....	10, 11
<i>Sijon v. Groen</i> , 289 S.C. 126, 345 S.E.2d 246, (1986).....	11, 12
<i>Simmons v. Simmons</i> , 392 S.C. 412 (2011); 370 S.C. 109 (Ct. App. 2006).....	10
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).....	6, 7
<i>Ware v. Ware</i> , 404 S.C. 1, 743 S.E.2d 817 (2013)	10
<i>Yates v. CACV of Colorado, LLC</i> , 303 Ga.App. 425, 693 S.E.2d 629 (2010)	9, 10, 11

Statutes

9 U.S.C. § 13 (2000).....	12
9 U.S.C.A. § 13 (1999).....	12

Other Authorities

Consent Order, California v. National Arbitration forum, Inc. et al, CGC-08-473569, October 18, 2011.....	8
Lightsey and Flanagan, <i>South Carolina Civil Procedure</i> (1985)	11
Minnesota Attorney General's Complaint against NAF.....	8, 13, 14
Wright & Miller, <i>Federal Practice and Procedure</i> , Section 2862(1973).....	11

Rules

(2).....	10
(3).....	10
Rule 60 (b) (1),	10
Rule 60 (b) (4)	10, 11
Rule 60 (b) (4).	6
Rule 60(b) (4)	11
Rule 60(b) (4).	6
SCRCP 60.....	5, 6, 9

INTRODUCTION

This case was originally brought before the court by way of supplemental proceeding in order to collect a judgment. The judgment was actually an arbitration award that had been certified by Greenville Court of Common Pleas in a default proceeding and enrolled in the county judgment rolls. The Defendant, Robert Bishop, filed a Motion to Vacate the Court's decision to certify the award. This arbitration award was issued by the National Arbitration Forum (NAF) against Mr. Bishop in favor of CACV of Colorado, LLC (CACV) for the sum of \$24,772.31. The Motion to Vacate was denied after a hearing before the Master on April 9, 2016 by Order dated May 9, 2016.

STATEMENT OF ISSUES ON APPEAL

- 1.) Should this Court enforce an arbitration award that was obtained through fraud, deception, and abuse of process.
- 2.) Does SCRCP 60 give authority to correct this improperly entered arbitration award.
- 3.) Does the failure to provide an arbitration agreement when seeking to enter an arbitration award deprive the Court of subject matter jurisdiction.
- 4.) Can lack of subject matter jurisdiction be raised during supplemental collection proceedings.

STATEMENT OF THE CASE

This case arises out of Appellant's alleged credit card debt in the amount of \$24,772.31. The alleged debt was sold by Bank of America, NA to a collection company, CACV of Colorado or "CACV", which obtained an arbitration award from an arbitration organization, the National Arbitration Forum ("NAF"). This organization has been determined by several state courts and agencies to be established and controlled

by credit card collection companies and their law firms for the sole purpose of obtaining default judgments against consumers and was forced out of business as a consequence of its deceptive practices. Rec _____.

The Appellant challenged the award, its certification, and entry in the judgment rolls for two reasons:

1.) The award was issued by the National Arbitration Forum ("NAF") which is a fraudulent or illegally established front of the credit card industry and has admitted or conceded by its actions, to being a front organization in several well-publicized judicial proceedings; thus its award against Mr. Bishop was a fraud upon the consumer and upon this court and should not have been certified.

2.) The certified award did not include an arbitration agreement as required under the Christianson case. *MBNA America National Bank, NA v. Christianson*, 659 S.E. 2d 209, 377 S.C. 210 (S.C App., 2008).

There are two other issues of immediate interest before the Court:

1.) Whether a judgment obtained through trickery, artifice, or deception may be challenged pursuant to Rule 60, specifically Rule 60(b) (4) of the South Carolina Rules of Civil Procedure (SCRCP).

2.) Whether an award which was certified by a circuit court without subject matter jurisdiction may be challenged by collateral means, during supplemental proceedings in the collection of a judgment under Rule 60 (b) (4), SCRCP.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)).

“nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Id.* (quoting *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667).

ARGUMENT

I. The Arbitration Agreement. Key to this case is whether the Plaintiff ever submitted an arbitration agreement to the certifying Court. Without a valid arbitration agreement the Court lacks subject matter jurisdiction to certify the arbitration award. The record in the Circuit Court is bare of any such proof and without *prima facie* proof of such an agreement, the award and the certification of the award is a nullity and void. *Christianson, supra. FIA v Weaver*, 62 So.3d 709 (La. S.C. 2011). No signed arbitration agreement with Mr. Bishop was ever produced to a South Carolina court. Rather, an unsigned and undated form was attached as “Exhibit A” to the complaint seeking to have the arbitration award certified and counsel for the respondent stipulated there was no executed arbitration agreement. Rec___. The form does not purport to be a document that is a mutually executed agreement. Rather it is in the form of a notice sent to the consumer along with his bill. This type of forced agreement has been universally criticized when reviewed by the judicial system. *Weaver, supra.* also report of forced arbitration, etc. The collection agencies use such “envelope stuffers” to assert an agreement was entered and thus force arbitration. However, most courts have held that in order to be enforced, these unsigned, so called agreements, there are several requirements; a) the date of mailing must be established by affidavits or other evidence and; b) after the mailing, there must be evidence of new activity ie. additional charges

on the card. Otherwise the credit card company cannot show that the consumer accepted the new terms of the alleged agreement and a valid arbitration agreement is necessary to show subject matter jurisdiction. In the instant case, all that CACV submitted to the circuit court was an unsigned form, not a part of the credit application, but a form that was mailed as an envelope stuffer inside his credit card statement. It was not dated, executed, witnessed and no affidavit was submitted as to when it was mailed or served to Mr. Bishop. It cannot possibly qualify on its face as an "agreement" as required by Christianson, *supra*. An agreement requires that two or more parties have mutually agreed upon something. There is nothing to show a mutual agreement in the record.

The practice of mailing these forms was a part and parcel of the NAF scheme to force arbitration before its biased forum. This practiced is detailed in the Minnesota Attorney General's Complaint against NAF and in the Louisiana Supreme Court case of Weaver, *supra*. Respondent has argued the Minnesota Attorney General's complaint does not prove anything since it was merely a complaint; however it is very significant that only five days after this complaint was filed, NAF hastily conceded to an order banning it from the industry and it was forced to cease and desist further arbitration proceedings. This was a business in which the credit card industry had invested \$42,000,000.00.¹ to gain control of NAF specifically. Rec____. Most of the allegations in the Minnesota complaint were later included as finding of fact and stipulated to by NAF's counsel in the Order and Injunction issued by State of California. (Record ____).

Rule 60 gives this court the authority and was implemented specifically for the purpose of correcting void judgments that were issued in situations such as this. When

¹ Consent Order, California v. National Arbitration forum, Inc. et al, CGC-08-473569, October 18, 2011

fraud leads to the procurement of the award or where there was clearly no arbitration agreement shown by *prima facie* evidence in the record, subject matter jurisdiction is lacking and the void judgment must be vacated.

No affidavit verified the authenticity of the alleged arbitration agreement and the complaint itself was not verified. Rec.____. There was no statement of account attached with the complaint. The arbitration form used by MBNA was sent subsequent to the issuance of a credit card in the form of an envelope stuffer along with the customer's statement. If these forms are enforced at all by the courts, it is on the basis of the fact that the consumer continued to use the credit card after receiving the form. In *Weaver*, *supra* the pernicious use of these envelope stuffer forms to assert an agreement was examined and the Court refused to allow forced arbitration. Most courts including the *Weaver* Court, have found that such agreements, in order to be enforceable, must be accompanied by an affidavit showing the date the form was sent to the consumer along with a statement of account showing that after the agreement was sent, the consumer continued to charge on the credit card. *Yates v. CACV of Colorado, LLC*, 303 Ga.App. 425, 693 S.E.2d 629 (2010); *Hutto v. CACV* , 308 Ga. App. 469 (2011). No such evidence was produced in this case. Mr. Bishop denied ever having seen the form or signing it. Rec.____. Additionally, respondent's attorney stipulated it was not an executed agreement. Rec.____. Despite requests and even after subpoenas were issued to both the NAF and CACV for all records related to this arbitration, none were ever produced.

II. Lack of Subject Matter Jurisdiction. Once there is an issue presented regarding the authenticity or existence of an arbitration agreement it becomes a matter of subject

matter jurisdiction. Christianson, *supra*. Subject matter jurisdiction is an issue which may be raised at any time during the proceedings even after a judgment is awarded and is not subject to the one year time limitation of Rule 60 (b) (1), (2) or (3). *Gatling v Beach Palace, Inc.*, 294 S.C. 464, 365 S.E. 2d 736 (Ct. App. 1988).² South Carolina has ruled that this issue may be raised long after the entry of judgment by motion pursuant to Rule 60 (b) (4) or (5). In *Simmons v. Simmons*, 392 S.C. 412 (2011); 370 S.C. 109 (Ct. App. 2006) an earlier alimony and support award was reviewed under this Rule almost 20 years after the original judgment. Rule 60(b)(4) of the South Carolina Rules of Civil Procedure provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding" if "the judgment is void[.]" Rule 60(b)(4), SCRPC. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect" *Ware v. Ware*, 404 S.C. 1, 743 S.E.2d 817 (2013).

In Mr. Bishop's testimony, he challenged the existence of the arbitration agreement, thus the burden shifts to the CACV to prove the existence of the arbitration agreement which it failed to do in these proceedings just as it had failed to present *prima facie* proof of an agreement at the time the award was certified. This unverified, unsigned agreement does not meet the burden of establishing an arbitration agreement existed. *Yates, supra; Weaver, supra; MBNA v. Credit*, 281 Kan. 655 (2006).

² While *Gatling* was held inapplicable in *McDaniel v. U.S. Fidelity and Guarantee Co.* 324 S.C. 639, 478 S.E.2d 868 (S.C. App. 1999), there the Court was not faced with a void judgment as would be the case if subject matter jurisdiction did not exist. Furthermore in the instant case, there was no argument presented by CACV, that Rule 60 (b) (4) required a motion by Mr. Bishop within a "reasonable time" to challenge this heretofore unknown judgment which came to his attention only after the supplemental proceeding was initiated. In the case instant, Bishop argues the judgment is void *ab initio* for lack of subject matter jurisdiction and McDaniel does not apply and was not even argued by respondent.

In the Georgia case cited above, the current plaintiff (CACV) sought to enforce awards from NAF in state proceedings, the Georgia court citing Christianson, *supra* favorably, refused to allow an undocumented award to proceed to collection even though the award was not challenged within the time period required by the Federal Arbitration Act. Yates, *supra*. The failure of CACV to properly document such claims is probably a calculated decision (also it was endemic at the time that MBNA accounts were not documented well. see *MBNA v Credit*, footnote 3, *infra*.) CACV makes a business practice of filing these claims with little or no supporting documents against consumers who will likely default. CACV calculates that some of these will result in a collection. It's a statistical bet just like the purchase of these accounts. In another Georgia case, with fact closely similar to those here, the only documents produced by CACV were woefully inadequate to support a summary judgment and the lower court was reversed on appeal. Hutto, *supra* Louisiana, Kansas and Tennessee have all refused to be bound by time restrictions or limitation when the litigation related to the subject matter jurisdiction of the issuing arbitration forum.

In *Gatling*, another South Carolina Court of Appeals case, our court found that under Rule 60 (b) (4), a judgment void for lack of subject matter jurisdiction might be challenged at any time. *Gatling v Beach Palace, Inc.*, 294 S.C. 464, 365 S.E. 2d 736 (Ct. App. 1988); Lightsey and Flanagan, *South Carolina Civil Procedure* (1985); Wright & Miller, *Federal Practice and Procedure*, Section 2862(1973); Moore, *Federal Practice*, para. 60.25(1985). *Sijon v. Groen*, 289 S.C. 126, 345 S.E.2d 246, (1986). However *McDaniel* required the motion to be made within a reasonable time. This issue (reasonable time) was not argued by the Respondent and the court did not rule whether

Bishop had made his motion under 60 (b) (4) within a reasonable time. Also *McDaniel* misreads *Sijon* because in *Sijon* the Court was not faced with a void judgment or the interpretation of Rule 60 (b) (4), but only if notice was properly given to the defendant.

The lack of a *prima facie* case in the records presented for certification of the arbitration award including the lack of any proof of the existence of an arbitration agreement are grounds for vacating the certification of the award. In *Christianson*, *supra*, failure to present an executed arbitration agreement was fatal to subject matter jurisdiction. The court held:

Accordingly, we apply South Carolina law to the initial determination of arbitrability but look to federal law for additional guidance.... MBNA did not demonstrate to the circuit court that Christianson had agreed to arbitrate. Before a circuit court confirms an arbitration award subject to the Federal Arbitration Act, there must be evidence of an arbitration agreement. 9 U.S.C.A. § 13 (1999). The Kansas Supreme Court, addressing this issue in *Credit*, found:

MBNA failed to attach a copy of the arbitration agreement to its motion to confirm the award. This violated the Federal Arbitration Act for which MBNA intermittently expresses respect. . . . This alone would have justified the district court in its decision to deny MBNA's motion to confirm the award. 132 P.3d at 901 (citing 9 U.S.C. § 13 (2000)).³

While personal jurisdiction over the parties may be waived, subject matter jurisdiction may not. In this case CACV only submitted an unsigned, unverified arbitration form without any affidavit showing when it was mailed or presented to Mr. Bishop or that he subsequently used the credit card. Perhaps other methods of proof could have also been used, but no effort at all to show how this form became an agreement was insufficient and failed to meet a *prima facie* test of the existence of an

³ While the alleged debt in this case was sold by Bank of America to CACV, it was an MBNA account and was serviced by MBNA. The lack of documents supporting the file was a regular feature of MBNA. The above Kansas court remarked: "Given MBNA's casual approach to this litigation, we are not surprised that [a national trend in which consumers are questioning MBNA and whether arbitration agreements exist] may be growing." *Credit*, 132 P.3d at 902. Cited in *Christianson*, at 659 S.E.2d 213.

agreement to arbitrate needed to confer subject matter jurisdiction upon the arbitrating agency, NAF. This truncated process was typical of that followed at the time by NAF and CACV. It was a process used throughout the country in obtaining these flawed awards. Rec____. Most courts now require much greater scrutiny on the part of the court certifying arbitration awards. Cases heard Georgia, Louisiana, Kansas and South Carolina and many others all require proof of an actual agreement in order to certify an award. See *Yates, Weaver, Credit, Christianson, supra*.

Mr. Bishop has repeatedly sought CACV to allow him to examine at least a copy of the Statement of Account showing his balance. Nothing has been produced aside from two random monthly statements, despite requests and subpoenas issued to both CACV and the National Arbitration Forum (NAF). This is typical of the processes used to obtain quick awards without any proof or accuracy on the part of the credit card companies who filed cases with the NAF. This institution was nothing more than a shell for these companies and lent the imprimatur of judicial authority to the highest bidders without even a semblance of due process. An arbitration award should be examined at least as closely as a foreign judgment before it is certified and enrolled as a judgment.

III. Lack of Due Process. The National Arbitration Forum issued this award on May 7, 2009. Just months later, in July, 2009, this institution was put out of business due to its hidden ties with the Credit Card collection industry. *Minnesota Attorney General complaint, supra*. The Attorney General for Minnesota found that the Forum and its processes and its decisions were wildly skewed in favor of the Credit Card collection industry and in fact it was found to be owned and controlled by these institutions. It was later stipulated by NAF that it had sold a controlling interest in its operation to the

collection industry for \$42,000,000.00. Significantly, these investors chose, in just 5 days, to shut this company down and lose this entire investment rather than face scrutiny by the Minnesota Attorney General. Rec___.

As a consequence of the Minnesota complaint, the Forum immediately ceased doing business and shut down its arbitration of consumer related cases. This was not disclosed to the Greenville court nor has it ever been disclosed in these proceedings until the collection action was filed. The lack of due process in connection with awards issued by a forum controlled by the industry it is hearing cases from is obviously a violation of due process. NAF recognized its untenable position; when presented with the findings of the Minnesota Attorney General, the Forum immediately acceded to these findings and shut its doors. Clearly the fraudulent and tainted decisions of this institution should not be enforced by our courts and to do so would be aiding and abetting the continuation of this fraudulent enterprise.

In later judicial proceedings in California, NAF entered into a consent judgment and stipulation of facts in which most of the allegations in the Minnesota Complaint were acknowledged. The decisions lead to a substantial payment by NAF in the sum of one million Dollars. Rec___.

SUMMARY

In summary, the Appellant urges the Court to rule that the order certifying the arbitration award should be vacated as a void judgment because there was insufficient proof of an arbitration agreement granting subject matter jurisdiction to the arbitrator.

Additionally, the arbitrator was not a disinterested party to the proceedings and its decision cannot be enforced. NAF was a tool of the credit card industry and to enforce its awards would be a violation of substantive due process.



William H. Thomas, III
South Carolina Bar #005537
P.O. Box 10498
Greenville, SC 29603-0498
(864) 298-0064
Attorney for Appellant

Greenville, South Carolina
October 21st, 2016

**WILLIAM H. THOMAS, III P.A.
ATTORNEY AT LAW**

October 21, 2016

South Carolina Court of Appeals
Attn: Jenny Abbot Kitchings
P.O. Box 11629
Columbia, SC 29211

RECEIVED

OCT 24 2016

SC Court of Appeals

Re: CACV v. Robert Bishop
Appellate Case No: 2016-001576

Dear Ms. Kitchings:

Please see enclosed in the above referenced matter:

1. Designation of Matter to be Included in the Record on Appeal;
2. Initial Brief of Appellant; and
3. Proof of Service.

Sincerely,



Kara Polaski

Paralegal to William H. Thomas, III

WHT/klp

Enclosures

Cc: Edward Overcash
Robert H. Bishop

William H. Thomas, III, PA
P.O. Box 10498
Greenville, SC 29603

062S0008785265
\$1.360
US POSTAGE
FIRST-CLASS
FROM 29650
OCT 21 2016
stamps.com

stamps.com
\$0.470
US POSTAGE
FIRST-CLASS
062S0008785265
29650
B0369202
stamps.com

stamps.com
\$0.470
US POSTAGE
FIRST-CLASS
062S0008785265
29650
B0369202
stamps.com

RECEIVED
OCT 24 2016
SC Court of Appeals

|||||
South Carolina Court of Appeals
P.O. Box 11629
Columbia SC 29211-1629