

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Loyd C. (Chad) Whitmire,)
)
Plaintiff,)
)
v.)
)
Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2016-CP-46-2458

ORDER DENYING DEFENDANTS'
MOTION TO COMPEL ARBITRATION

RECEIVED

NOV 15 2016

SC Court of Appeals

This matter came before the court on September 15, 2016, upon Defendants' motion to stay or dismiss this action in its entirety, and to compel arbitration. Plaintiff was represented by W. Keith Martens. Defendants were represented by H. Freeman Belser. Both sides presented affidavits and arguments in support of their respective positions. Based on the record presented, I make the following findings and conclusions.

BACKGROUND

This lawsuit arises from, among other things, the parties' dispute over their relative membership interests in The Commons at Fort Mill, LLC (the "Company"). The Company owns and operates a 144-unit apartment complex in Fort Mill, South Carolina, which generates recurring monthly revenue, derived primarily from rents charged to tenants of the complex. The affidavits submitted by the parties establish that the Company, which was formed in late 2014, is the most recent business entity in their long-standing business relationship, which was formed for the primary purpose of developing, constructing, owning and operating the apartment complex. Though other investors have come and gone, Plaintiff and Defendant Hawkensen have consistently been a part of the project's core ownership group. Over the years, the ownership group has transferred title from one limited liability company to another. The Company was formed in October, 2014, and is simply the most recent limited liability company to hold title.

Between October, 2011, and October, 2014, the entity that held title was Crossroads Commons Phase I, LLC. Whitmire, Hawkensen, and two other men were the members of that

mc
#1

company. In October 2014, Whitmire and Hawkensen bought out the membership interests of the other members. Shortly thereafter, Crossroads Commons Phase I, LLC, conveyed its real property to the newly-formed Company.

On October 28, 2014, Whitmire and Hawkensen executed a written Operating Agreement for the Company ("Operating Agreement"). Page one of the Operating Agreement contains, at the top of the page, the following notice in bold-type, underlined and all capital letters:

THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION PURSUANT TO S.C. CODE ANN. 15-48-10 ET. SEQ. (1976 AS MAY BE AMENDED)

Other than this notice, the Operating Agreement contains no mention of arbitration. Nothing in the body of the Operating Agreement outlines procedures for resolution of the parties' disputes, or specifies which disputes will be submitted to arbitration.

Whitmire filed this action in August, 2016, alleging that, since approximately December 2014, he has been wrongly excluded from the business, operations and accounts of the Company. Whitmire also alleges that Hawkensen has refused to recognize Whitmire's proper membership interest in the Company, and that Hawkensen is operating the Company without regard for Whitmire's rights as a member. Whitmire's complaint contains eight causes of action, including claims for breach of Hawkensen's duty of loyalty and care, breach of contract, breach of contract accompanied by fraud, negligence, gross negligence and violation of South Carolina's UTPA. Whitmire also seeks an order under South Carolina's dissociation statute, establishing the value of his interest in the Company, and requiring the Company to purchase his interest.

Before answering the Complaint, Hawkensen moved for an order compelling Whitmire to submit all of his claims to arbitration, pursuant to S.C. Code Ann. § 15-48-20 (1976, as amended). Alternatively, Hawkensen contends that Whitmire's claims are subject to arbitration under the Federal Arbitration Act.

ANALYSIS

I. Federal Arbitration Act ("FAA").

By its express terms, the FAA applies only where the parties' written arbitration agreement is contained in a "... maritime transaction or a contract evidencing a transaction in interstate commerce." 9 U.S.C. § 2. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117

mk
#2

(2001). The FAA is inapplicable to any transaction involving purely intrastate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). “Our courts consistently look to the essential character of the contract when applying the FAA.” *Thornton v. Trident Med. Ctr., LLC.*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003) (finding it was proper to “focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved”).

Defendants argue that the Company’s Operating Agreement is a contract evidencing a transaction in interstate commerce because Whitmire, a resident of North Carolina, is a member of the Company. I find and conclude that Whitmire’s residency, standing alone, is insufficient to establish an interstate commerce connection.

Per the terms of the Operating Agreement, the Company is a “single purpose real estate holding entity.” Its only purpose is to own and operate an apartment complex that the parties developed and constructed in Fort Mill, South Carolina. South Carolina has “. . . continued to adhere to the view that the development of real estate is an inherently intrastate transaction.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012)(no interstate connection related to sale or real property, even though out-of-state construction materials were used, mortgage lender for purchase was located in North Carolina, and home was covered by warranty issued by national warranty company); *see also Zabinski, supra*, 346 S.C. at 595, 553 S.E.2d at 117-18 (“The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.”). The Company’s Operating Agreement is the governing document for a South Carolina limited liability company, and the Company’s business activities are entirely within South Carolina. The Operating Agreement is not a contract “evidencing a transaction in interstate commerce”, and contains nothing to that effect. Thus, the FAA does not apply to this dispute, and I so conclude.

II. South Carolina Uniform Arbitration Act.

I also find and conclude that Defendants have failed to establish that they are entitled to compel arbitration pursuant to the provisions of the South Carolina’s Uniform Arbitration Act (S.C. Code § 15-48-10 *et seq.* (1976, as amended).)

A. Defendants have failed to “show an agreement” to arbitrate.

§ 15-48-10 provides:

(a) *A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration* any controversy thereafter arising between the parties

OCM
#3

is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. ***Notice that a contract is subject to arbitration*** pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration. (Emphasis added.)

§ 15-48-20(a) provides:

a) On application of a party ***showing an agreement described in § 15-48-10***, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied. (Emphasis added.)

A party seeking to compel arbitration pursuant to § 15-48-20 has the initial burden of ". . . showing an agreement described in § 15-48-10 . . ." has been entered into by the parties. In turn, § 15-48-10 describes that agreement as "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties . . ." § 15-48-10(a). § 15-48-10 further provides that, in order for the parties' arbitration agreement to be enforceable under state law, "notice that a contract is subject to arbitration" must be "typed in underlined capital letters or rubber-stamped prominently on the first page of a contract."

"[I]t is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (other citations omitted)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.*

By its express terms, § 15-48-10 requires both an "agreement" to arbitrate and a "notice" that the parties' agreement is subject to arbitration. It is clear that an "agreement" to arbitrate and a "notice" of arbitration are separate and distinct requirements, both of which must exist before arbitration may be compelled. While an agreement to arbitrate is unenforceable unless notice of the agreement is "prominently" placed on the first page of the contract, on the other hand, the mere presence of a notice, without a specific agreement to arbitrate, is insufficient.

While the Company's Operating Agreement contains a notice that the terms and

OMK
B 4

conditions of the Operating Agreement are subject to arbitration, it does not contain any provision whereby the parties actually *agreed* to arbitrate any particular "controversy thereafter arising." Defendants have failed to "[show] an agreement as described in §15-48-10", and, therefore, they are not entitled to pursue arbitration under § 15-48-20. There simply is no arbitration agreement for the court to consider or enforce.

B. The notice does not require submission of Plaintiff's claims to arbitration.

As discussed above, the court cannot reconcile Defendants' position with the plain language of § 15-48-10, which requires both an agreement and a notice. Nevertheless, even if the notice is viewed as the parties' agreement to arbitrate, it does not follow that Plaintiff's claims are subject to arbitration.

Whether a party has agreed to arbitrate an issue is a matter of contract interpretation. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). In determining whether an arbitration agreement applies to a particular dispute, the court must consider whether the factual allegations underlying the plaintiff's claim are within the scope of the parties' arbitration agreement. *Parsons v. John Wieland Homes, Inc.*, Op. No. 2014-000782, 2016 WL 4411112, at *2 (S.C. Aug. 17, 2016).

The "notice of arbitration" printed on the first page of the Operating Agreement, states only that the "*terms and conditions of this operating agreement* are subject to arbitration." (Emphasis added.) Thus, even if the notice were also an arbitration agreement, that agreement would require the parties to arbitrate disputes concerning the "terms and conditions" of the Operating Agreement. However, Plaintiff's claims do not turn upon the "terms and conditions" of the Operating Agreement. They did not agree to arbitrate claims of the kind asserted in Plaintiff's complaint. Had the parties intended that "any and all disputes" between them be arbitrated, they could have included such a provision in the Operating Agreement. They did not.

Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009), citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). It is a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "If the intention of the parties is clear, the Courts have no authority to change the contract in any particular" *Carroway v. Johnson*, 245 S.C. 200, 203, 139 S.E.2d 908, 910

[Handwritten signature]
5

(1965); see also, *S.S. Newell & Company v. American Mutual Liability Insurance Company*, 199 S.C. 325, 332, 19 S.E.2d 473 (1942). I find and conclude that there is no ambiguity in the language of the Operating Agreement.

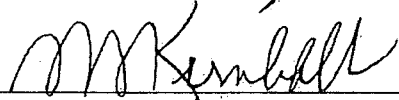
“Arbitration is a matter of consent, and not coercion.” *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 697 (2010), quoting *Volt Infor. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)). The parties did not agree that “any and all disputes” between them must be arbitrated, and Plaintiff did not agree to arbitrate the claims he has asserted in this action. He cannot now be forced to do so.

CONCLUSION

Based on the findings and conclusions herein, it is ordered that Defendants’ motion to compel arbitration and stay this action be denied.

AND IT IS SO ORDERED.

October 5, 2016



S. Jackson Kimball
Special Circuit Court Judge
York County

#6