

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-000197
Case. No. 2016-CP-10-4668

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SC Court of Appeals

Kyle J. Kibler,

Plaintiff/Appellant,

v.

Basil C. Peyton and
Origin Point Brands, LLC

Defendants/Respondents,

RESPONDENTS' MEMORANDUM ON THE
APPEALABILITY OF THE COURT'S JANUARY 6, 2017 ORDER

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Counsel for Appellant Kyle J. Kibler

Respondents Origin Point Brands, LLC (“OPB”) and Basil C. Peyton (“Peyton”), respectfully submit this memorandum addressing the Court’s inquiry as to whether the Charleston County Court of Common Pleas’ January 6, 2017 Order (hereinafter the “Order”) is appealable. Based on clear South Carolina Supreme Court precedent, the Order is not immediately appealable. Therefore, Appellant Kyle Kibler’s (“Kibler”) appeal should be dismissed.

I. PROCEDURAL BACKGROUND

Kibler filed a Complaint in the Charleston County Court of Common Pleas on September 1, 2016, alleging causes of action for defamation and intentional infliction of emotional distress against OPB and Peyton. In response to the Complaint, OPB and Peyton filed a motion to compel arbitration of Kibler’s claims based on the arbitration provision in Kibler’s employment agreement with OPB. Kibler responded in opposition to the motion, arguing that his claims were outside the scope of the arbitration provision in his employment agreement. The Court of Common Pleas heard oral argument on January 4, 2017 and issued its Order on January 6, 2017, holding that “the action should be stayed and arbitration is compelled.”

Kibler filed a Notice of Appeal on January 30, 2017, appealing the Order compelling arbitration and staying the action. This Court then sent counsel for all parties a letter on February 7, 2017, stating that a “preliminary review of the order challenged on appeal indicates it might not be appealable.” The Court thus directed counsel for all parties to file a memorandum addressing the issue of appealability.

As set forth below, the Court correctly questioned the appealability of the Order as binding precedent holds it is not appealable.

II. ARGUMENT

The South Carolina Supreme Court has ruled on numerous occasions that an order compelling arbitration and staying an action pending arbitration is not an appealable order. *See, e.g., Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (S.C. 1995) (“[T]he order in this case, which stays this action and compels arbitration, is not immediately appealable”); *Johnson v. Paraplane Corp.*, 321 S.C. 316, 317 n.1, 468 S.E.2d 620, 620 n.1 (S.C. 1996) (“[A]n order compelling arbitration is not immediately appealable.”); *Toler’s Cove Homeowners Assoc., Inc. v. Trident Construction Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (S.C. 2003) (“[T]he court’s order compelling arbitration is not immediately appealable.”); *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (S.C. 2004) (“[T]he order compelling arbitration of the claims . . . and staying the remaining claims is not immediately appealable.”).

The South Carolina Supreme Court first declared that an order staying an action and compelling arbitration is not immediately appealable in *Heffner*. In reaching this conclusion, the Court explained that “[t]he policy of the United States and this State is to favor arbitration of disputes.” *Heffner*, 321 S.C. at 537, 471 S.E.2d at 136. The Court then noted that consistent with this policy, South Carolina’s legislature enacted a statute, S.C. Code Ann. § 15-48-200(a), “which restrict[s] the right to appeal orders which favor arbitration over litigation.” *Id.* The Court in *Heffner* thus interpreted § 15-48-200(a) as prohibiting an appeal of an order that stays an action and compels arbitration. *Id.*

Later, in *Toler’s Cove*, the South Carolina Supreme Court held that the prohibition on appealing orders compelling arbitration applies with full force when the Federal Arbitration Act (“FAA”) controls the arbitration agreement at issue, as it does here. 355 S.C. at 611, 586 S.E.2d

at 584-85. Consistent with these holdings from the South Carolina Supreme Court, the Fourth Circuit Court of Appeals has held that under the FAA, an order compelling arbitration and staying further proceedings before it is not appealable. *Humphrey v. Prudential Securities Inc.*, 4. F.3d 313, 319 (4th Cir. 1993).

Here, the Order expressly states that arbitration is being compelled and the action “stayed.” Based on the numerous South Carolina Supreme Court cases cited herein, which are binding precedent, the Order is not immediately appealable. Therefore, Kibler’s appeal should be dismissed.

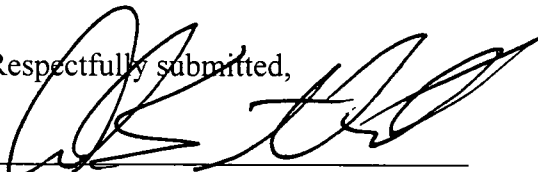
III. CONCLUSION

For the reasons set forth above, the Court of Common Pleas’ Order is not appealable, and thus Kibler’s appeal should be dismissed.

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Respectfully submitted,


By:


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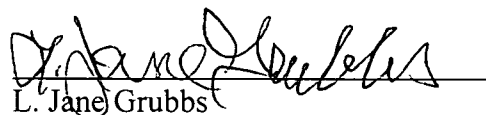
ATTORNEYS FOR DEFENDANT BASIL
PEYTON

This 15th day of February, 2017.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing RESPONDENTS' MEMORANDUM ON THE APPEALABILITY OF THE COURT'S JANUARY 6, 2017 ORDER has been sent to counsel of record for Appellant Kyle Kibler by United States Mail and addressed as follows:

Christopher C. Mingledorff
Moore Ingram Johnson & Steele, LLP
885-B Island Park Drive
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L. Jane Grubbs

This is the 15th day of February, 2017.

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February 15, 2017

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SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Kyle J. Kibler v. Basil C. Peyton and Origin
Point Brands, LLC
Appellate C.A. No.: 2017-000197

Dear Ms. Kitchings:

Enclosed please find for filing the original and one copy of Respondents' Memorandum on the Appealability of the Court's January 6, 2017 Order in the above-referenced matter. Please file the original and return the clocked copy to us in the self-addressed stamped envelope.

Sincerely,

JACKSON LEWIS P.C.

Andreas N. Satterfield, Jr.

ANS/ljg

Enclosures

cc: Christopher C. Mingledorff, Esq.
Mark H. Wall, Esq.