THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2016-CP-25-00409
Appellate Case No. 2017-00158

Calvin Clark, ... Respondent,

v.

U.S. Money Shops of South Carolina, LLC and Claude M. Beacham, Jr. d/b/a Recovery, Inc. and Wrecker Service, ... Defendants,

Of whom U.S. Money Shops of South Carolina, LLC is ..... Appellant.

Initial Brief of Appellant

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Statement of the Case

This appeal involves the denial of the motion to compel arbitration filed by Appellant U.S. Money Shops of South Carolina, LLC ("U.S. Money"). Respondent Calvin Clark initiated this action against Appellant U.S. Money Shops of South Carolina, LLC ("U.S. Money"). {Complaint, R. ___}. U.S. Money answered and moved to compel the claims to arbitration. {Answer, R. ___; Motion to Dismiss or Stay and Compel Arbitration, R. ___}. The circuit court found that U.S. Money waived its right to compel arbitration based solely on the timing of the filing of U.S. Money's motion to compel arbitration. {Form 4 Order dated April 17, 2017, R. ___}. This appeal followed.

Statement of the Facts

Clark entered into a contract with U.S. Money to borrow funds for personal or household use. {Supervised Loan Agreement, R. ___}. Clark admitted in his complaint that he entered into the contract on March 22, 2013. {Complaint at ¶4, R. ___}. The contract contained an arbitration provision that provided:

> ARBITRATION PROVISION AND WAIVER OF JURY TRIAL. Arbitration is a process in which persons with a dispute: (a) waive their rights to file a lawsuit and proceed in court and to have a jury trial to resolve their disputes; and (b) agree, instead to submit their disputes to a neutral third party person (an "arbitrator") for a decision. Each party to the dispute has an opportunity to present some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute, which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:
> 1. For purposes of this Arbitration Provision and Waiver of Jury Trial (hereinafter the "Arbitration Provision"), the words "dispute" and "disputes" are given the broadest possible meaning and include without limitation (a) all claims, disputes or

> controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Loan Agreement (including the Arbitration Provision), the information you gave us before entering into this Loan Agreement, including the Customer Information Sheet and/or any past agreement or agreements between you and us; (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud or other intentional torts; (e) all claims based upon a violation of any state or federal constitution, statute or regulation; (f) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; (g) all claims asserted by you individually against us and/or any of our employees, agents, directors, officers, shareholders, managers, members, parent company or affiliate entities (hereinafter collectively referred to as "related third-parties"), including claims for money damages and/or equitable or injunctive relief.

{Supervised Loan Agreement p. 2, R. ___}.

Thereafter, Clark filed suit against U.S. Money and alleged various causes of action that directly related to the contract and the duties and obligations contained in the contract. {Complaint; R. ___}. The unambiguous terms of the arbitration agreement executed by Clark control the claims alleged in the complaint and required the dispute be resolved in arbitration. {Supervised Loan Agreement p. 2, R. ___}. As a result, U.S. Money answered and asserted as an affirmative defense that the circuit court lacked jurisdiction based on the arbitration and jury trial waiver provision agreed to by the parties. {Answer filed February 20, 2017 at ¶24, R. ___}. U.S. Money also moved to dismiss or stay the action and compel the matter to arbitration. {Motion to Dismiss or Stay and Compel Arbitration filed February 21, 2017, R. ___; Memorandum in Support of Motion to Dismiss or Stay and Compel Arbitration, R. ___}. Clark filed no written opposition to the motion to compel arbitration.

At the hearing on the motion, Clark argued for the first time that U.S. Money waived its right to compel arbitration. {Transcript dated April 10, 2017 p. 9, R. ___}. Clark specifically limited his argument to the fact that U.S. Money waived arbitration because it did not timely request arbitration, claiming that:

> [I]t has to do with the waive, by not timely requesting it, that they have waived their right to compel arbitration . . . . They filed their answer on February 20th and their motion on the 21st and 22nd. So the first basis is they have clearly waived their right to enforce arbitration agreement by not timely requesting that (sic).

{Transcript p. 9, R. ___}. Notably, Clark informed the circuit court that he did not oppose the motion on the timeliness of U.S. Money's answer or whether U.S. Money defaulted. {Id.}. Clark admitted that his opposition "doesn't have anything with [U.S. Money] being in default (sic)." {Id.}.

U.S. Money opposed Clark's waiver position based on the fact that the motion to compel was filed immediately after the answer. {Transcript p. ___, R. ___}. U.S. Money filed its answer on February 20, 2017. {Answer filed February 20, 2017, R. ___}. The answer asserted the arbitration provision as a defense. {Answer filed February 20, 2017 at ¶24, R. ___}. The next day, February 21, 2017, U.S. Money filed its motion to compel arbitration. {Motion to Dismiss or Stay and Compel Arbitration filed February 21, 2017, R. ___}.

The circuit court entered a Form 4 order that found U.S. Money waived its right to compel arbitration based solely on the timing of the filing of U.S. Money's motion to compel arbitration. {Form 4 Order dated April 17, 2017, R. ___}. The order stated, in its entirety, that "[U.S. Money's] Motion to Dismiss or in the alternative Motion to Stay and Compel

Arbitration is respectfully denied for failure to timely raise the right to arbitration." {Id.}. U.S. Money appealed that waiver ruling to this Court.

Argument

I. The circuit court erred in finding U.S. Money waived the right to compel arbitration based solely on Clark's argument that U.S. Money moved to compel arbitration one (1) day after filing its answer.

U.S. Money expeditiously moved to compel arbitration in this matter. Clark's waiver claim did not satisfy his burden to prove the elements necessary to allow a finding of waiver by the circuit court. In fact, Clark failed to provide any of the elements of the waiver test. Thus, the circuit court erred in finding U.S. Money waived its right to compel this matter to arbitration. This Court should reverse.

In order for the party opposing a motion to compel arbitration "to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Wilson v. Willis, 416 S.C. 395, 420, 786 S.E.2d 571, 584 (Ct. App. 2016); Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

Our courts must consider three factors when determining whether a party waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to

> compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Willis, 416 S.C. at 420-21, 786 S.E.2d at 584; Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration." Willis, 416 S.C. at 421, 786 S.E.2d at 584. However, "[w]hat constitutes a substantial length of time" hinges directly "upon the extent of discovery conducted" by the moving party and whether the non-moving party suffered prejudiced. Id.; Rhodes, 374 S.C. at 126, 647 S.E.2d at 251. The "non-moving party must show something more than 'mere inconvenience'" in order to establish the prejudice element of the test. Willis, 416 S.C. at 421, 786 S.E.2d at 584 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)).

Moreover, the court must also consider "the extent to which the parties have availed themselves of the circuit court's assistance." Willis, 416 S.C. at 421, 786 S.E.2d at 584; Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013). Under that prong of the test:

> [O]ur courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) **if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will not likely exist, and the law would favor arbitration**; (2) if the parties conduct significant discovery, then the party seeking arbitration has "taken advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration.

Willis, 416 S.C. at 421, 786 S.E.2d at 584-85 (emphasis added); Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52.

Clark failed to establish **any** of the elements necessary to find waiver in this matter. Clark's sole position to the circuit court was that U.S. Money "waived their right to compel arbitration . . . . They filed their answer on February 20th and their motion on the 21st and 22nd. So the first basis is they have clearly waived their right to enforce arbitration agreement by not timely requesting that (sic)" {Transcript p. 9, R. ___}.[1] Clark's argument fails to demonstrate substantial delay, that U.S. Money utilized the litigation process through discovery at all, or that Clark suffered prejudice as required by the waiver test.

First, a substantial length of time did not transpire between Clark commencing this action and U.S. Money filing the motion to compel arbitration. Clark served the complaint on November 22, 2016. U.S. Money moved to compel arbitration on February 21, 2017, only 91 days from initiation of the action.

Such a brief interval does not support a finding of substantial delay under South Carolina law. Willis, 416 S.C. at 422, 786 S.E.2d at 585 (finding that a six to eleven month period from the initiation of the action to the filing of the motion to compel did not constitute substantial delay); also compare Deloitte & Touche, LLP v. Unisys Corp., 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half-year period in which the parties "conducted a significant amount of discovery, resulting in the production of thousands

[1] When the circuit court issued the Form 4 order denying the motion to compel "for failure to timely raise the right to arbitration," that ruling can only be supported by this sole argument presented by Clark. As a result, the circuit court order is one of waiver of the right to arbitrate and no other ground. However, out of an abundance of caution, U.S. Money challenges the circuit court ruling on an alternate ground in section II, infra.

of documents" was sufficient for waiver), Evans, 352 S.C. at 548, 575 S.E.2d at 75–76 (finding a nineteen-month period in which the parties exchanged written interrogatories, requests for production, and the party requesting arbitration took two depositions demonstrated waiver), and Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753–54 (finding a two-and-a-half-year period in which the parties sought assistance from the court on approximately forty occasions constituted waiver), with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and the respondent "had not held any depositions," did not demonstrate waiver), Rich v. Walsh, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen-month period in which "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not amount to waiver), and Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months in which the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver). Therefore, U.S. Money timely moved to compel arbitration in this matter as a matter of law.

Second, Clark failed to establish that "the party requesting arbitration engaged in extensive discovery before moving to compel arbitration" or that U.S. Money "availed [itself] of the circuit court's assistance," as required by the waiver test. U.S. Money did not engage in any discovery in this matter. In fact, no litigation activity has occurred other that the service of the complaint, the answer, and the motion to compel arbitration. This lack of discovery or any other litigation activity supports the fact that a substantial amount of time had not transpired in this case before U.S. Money moved to compel arbitration. See, e.g., Willis,

416 S.C. at 422-23, 786 S.E.2d at 585 (holding that the limited litigation activity "supports the notion that a substantial amount of time had not transpired in this case before [the party] moved to compel arbitration"); Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52 (noting that if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system, prejudice will not likely exist, and the law would favor arbitration"). As a result, U.S. Money did not take advantage of the judicial system or otherwise engage in discovery so as to allow a finding of waiver by the circuit court.

Third, Clark failed to prove, or even mention, prejudice sufficient under the waiver test. "Mere inconvenience" in having to resolve this matter in arbitration does not provide sufficient ground to deny U.S. Money's motion to compel arbitration. Willis, 416 S.C. at 423, 786 S.E.2d at 585 (holding that the "mere inconvenience" caused by an eleven-month delay in moving to compel arbitration was not sufficient to find waiver); Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52 (noting that if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will not likely exist, and the law would favor arbitration"). Simply put, Clark was not prejudiced by the timing of the motion to compel arbitration.

Based on the above, Clark failed to establish the elements necessary for waiver as a matter of law. The circuit court therefore erred in finding U.S. Money waived its right to compel this matter to arbitration. This Court should reverse and remand the matter to the circuit court to decide the merits of the motion to compel arbitration.

II. Assuming arguendo that the circuit court order found that U.S. Money waived the right to compel arbitration because it moved after the expiration of the answer deadline, the circuit court still erred in denying the motion on that basis.[2]

U.S. Money moved to compel arbitration prior to any entry of default under Rule 55, SCRCP. As noted at the hearing, Clark never filed an affidavit of default or moved for entry of default by the clerk of court. {Transcript p. 10-12, R. ___}. The plain and unambiguous language of Rule 55, SCRCP, requires an affidavit of default to be filed before a party can be found to be in default. Thus, any such argument by Clark would not support a finding that U.S. Money waived the right to arbitrate this matter. The circuit court erred in making any such ruling.

Rule 55, SCRCP, provides in relevant part that:

> **(a) Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and **that fact is made to appear by affidavit or otherwise**, the clerk shall enter his default upon the calendar (file book).

Rule 55(a), SCRCP (initial emphasis in original, bold/underlined emphasis added). This plain language mandates that a party take affirmative action to have a default entered. The action required by the rule is the filing of an affidavit of default or to otherwise move for entry of default before default can be entered and held against the defendant. Our rules of construction establish this interpretation of entry of default.

Courts interpreting the South Carolina Rules of Civil Procedure apply the same rules of construction used to interpret statutes. Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003); see also Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 638,

[2] As noted in section I, supra, the circuit court did not premise the ruling on this basis because Clark specifically informed the circuit court that he did not seek relief on that basis. However, because the Form 4 order provides no citation to authority to support the one sentence ruling, U.S. Money briefs this issue out of an abundance of caution.

627 S.E.2d 724, 726 (2006) (applying that premise to hold the plain language of a rule of civil procedure controlled the issue). If the language of the rule is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted) ("[I]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning"); Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002).

Courts will reject an interpretation leading to an absurd result clearly unintended by language employed. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

As noted above, Rule 55(a), SCRCP, requires the filing of an affidavit of default or to otherwise move for entry of default before default can be entered and held against the defendant. Clark took no such action in this matter. Thus, when U.S. Money answered and moved to compel the claims to arbitration, it did so in a timely fashion and before any default was or could be entered. Acceptance of Clark's position and the circuit court ruling would render the phrase "that fact is made to appear by affidavit or otherwise" from Rule 55, SCRCP, superfluous. Such a construction would be in error. See, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"); Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373,

396, 520 S.E.2d 142, 154 (1999) (stating that courts should "avoid a construction that would read a provision out of a statute").

As a result, U.S. Money timely moved to compel this matter to arbitration. A construction of the circuit court order that U.S. Money untimely moved would be contrary to the plain language of Rule 55(a), SCRCP, and the test for waiver utilized by our courts. The circuit order constitutes error. This Court should reverse.

Conclusion

Based on the foregoing, the circuit court erred in denying U.S. Money's motion to compel arbitration. This Court should reverse and remand this action to the circuit court for a determination of the motion to compel arbitration.

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October 3, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM HAMPTON COUNTY
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Of whom U.S. Money Shops of South Carolina, LLC is ..... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for U.S. Money Shops of South Carolina, LLC, do hereby certify that I have served all counsel in this action with copies of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Initial Brief of Appellant**

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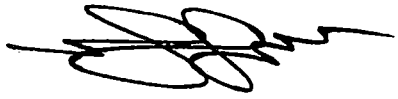
RE: Calvin Clark v. U.S. Money Shops of South Carolina, LLC, et al.
Civil Action No. 2016-CP-25-00409
Appellate Case No. 2017-001158
Our File No. 53377/01500

Dear Ms. Kitchings:

Enclosed for filing in the above-reference matter please find the original and one copy of the Initial Brief of Appellant and Designation of Matters. Please return clocked-in copies to us via our courier.

By copy of this letter, we are serving all counsel with this document.

Very truly yours,



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