RECEIVED

DEC 07 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-000798
Lower Court Case Nos. 2013-CP-29-00649, - 00792

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Petitioners.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc., are the . . . Petitioners.

REPLY BRIEF OF PETITIONERS

W. Mark White
W. Chaplin Spencer, Jr.
SPENCER & SPENCER, P.A.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
Tel: (803) 327-7191

ATTORNEYS FOR PETITIONERS

Other Counsel of Record:

Beth Richardson, Esq.
Elizabeth Gray, Esq.
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, SC 29201
Attorneys for Woodforest Bank, N.A.

J. Cameron Halford
Halford, Niemiec & Freeman, LLP
238 Rockmont Drive
Fort Mill, SC 29708
Attorney for Respondents

Leland Greeley
Leland Greeley, P.A.
P.O. Box 2981
Rock Hill, SC 29732
Attorney for Respondents

INDEX

TABLE OF AUTHORITIES

Cases

Rules

Statutes

ARGUMENTS

I. Petitioners Were Aggrieved by the Lower Court's Refusal to Enforce the Arbitration Clause as Written.

Respondents offer no basis to sustain the Court of Appeals' erroneous finding that Petitioners were not aggrieved by the lower court's refusal to grant the relief sought in the motions to compel arbitration. Significantly, Respondents do not claim that the lower court granted the full relief sought by Petitioners. Respondents acknowledge that Petitioners moved the lower court to enforce the arbitration clause as written, which mandates the arbitration occur in Montgomery County, Texas. Respondents acknowledge that Petitioners were not granted the relief sought in that the lower court did not order the arbitration be conducted in Montgomery County, Texas. Yet, Respondents blankly maintain that Petitioners are not aggrieved.

This argument is specious. Respondents cite no legal precedent to support their contention that Petitioners were not aggrieved by the lower court's unilateral modification of the agreement between the contracting parties. Respondents do not address the substance of any case cited by Petitioners on this issue. Rather, Respondents proffer a hodgepodge assortment of legal jargon, none of which is relevant to the legal issue presented.

First, Respondents erroneously attempt to interject their arguments on the merits of the lower court's order. The issue before this Court is whether the Court of Appeals erred in dismissing this appeal. A full discussion of the clear errors in the lower court's decision on the merits is contained in the Initial Brief of Appellants filed with the Court of Appeals. (Appx. pp. 1-27.) It bears note that Respondents' arguments on the merits interject facts not found within the record of this appeal.

Second, Respondents mention random terms or phrases (e.g. prejudice, core available relief, inherent power to manage complex litigation) which have no application to the issue of whether Petitioners were aggrieved by the lower court's order. Respondents do not cite any legal authority which employs these terms or phrases. No case law can be found using these terms or phrases in this context. Respondents' use of these terms and phrases is legal gibberish. For example, the sole instance Respondents cite a case addressing the issue of an aggrieved party is Forney v. Apfel, 524 U.S. 266 (1998). (Brief of Respondents, pp. 7, 8.) Respondents do not address the holding of this case or its application to this matter. Rather, the next sentence after the citation is "[t]he issue for Appellants, here, is that [sic] can cannot [sic] demonstrate *prejudice*." (Brief of Respondents, p. 8.) The

Forney case does not mention, utilize or address prejudice in its discussion of aggrieved party status.

Lastly, Respondents cite S.C.Code Ann. § 15-7-120 in support of their position. However, this statute is preempted by the FAA. Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct.App.2000) (holding that "[t]he trial court erred by applying § 15-7-120 to the arbitration clauses *sub judice* because state law is preempted by the [FAA]. . . .").

The proper analysis of this issue is set forth in the Brief of Petitioners. Succinctly, "Rule 201(b), SCACR, provides that '[o]nly a party aggrieved by an order, judgment, or sentence may appeal.' We recently reiterated that '[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.'" Shaw v. City of Charleston, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct. App. 2002)(citations omitted). The primary relief sought by Petitioners was enforcement of the arbitration clause as written in Montgomery County, Texas. It was only after the lower court refused to enforce *any* form of arbitration that Petitioners requested the alternative and partial relief of arbitration in Lancaster County, South Carolina. If the lower court had enforced the arbitration provision in Texas, as it should have, alternative relief

would not have been necessary. Sickora v. Metropolitan Life Ins. Co., 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) ("The alternative relief did not prevent a review by this Court on the basic contention. If the primary relief had been granted, as it should have been, the alternative motion would have been unnecessary").

Further research on this issue readily provides additional support for Petitioners' position. "The law recognizes that despite having been a 'winning' party below, a party can still be aggrieved by a judgment of the court." North Am. Rescue Prod., Inc. v. Richardson, 396 S.C. 124, 134, 720 S.E.2d 53, 59 (Ct.App. 2011) *rev'd on other grounds*, 411 S.C. 371, 769 S.E.2d 237 (2015); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct.App. 1997)(rejecting claim that party was not aggrieved from the order granting "the alternative position" from responsive pleadings).

Refusal to allow this appeal ignores the definition of aggrieved party and clear precedent. Petitioners were aggrieved by denial of arbitration in Texas as required by Rule 201(b), SCACR, and this matter should be decided on the merits.

II. THE REFUSAL TO COMPEL ARBITRATION AS PRESCRIBED BY THE AGREEMENT IS IMMEDIATELY APPEALABLE

In their Brief, Respondents recognize that this appeal is about the lower court's failure to compel arbitration as set

forth in the parties' agreement. This is substantially different from a lower court's *enforcement* of an arbitration agreement that is not immediately appealable. This case involves a lower court's refusal to enforce an arbitration agreement as written, which is immediately appealable. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464, n. 4 (2013)(finding that an "order denying arbitration is immediately appealable"); see also S.C.Code Ann. § 15-48-200(a)(1) (an appeal may be taken from an order denying an application to compel arbitration).

The arbitration forum affects a substantial right and thus should be immediately appealable. "Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'" Grant v. Magnolia Manor Greenwood, Inc., 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009). "Arbitration provisions, this Court has noted, are a species of forum-selection clauses." Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 698, 130 S. Ct. 1758, 1783, 176 L. Ed. 2d 605 (2010).[1]

---

[1] Again, Respondents attempt to argue the enforceability of the forum selection clause. This issue is not before the Court. However, Petitioners note the extremely high burden that Respondents must prove to invalidate an agreed upon forum selection clause. In Atl. Floor Servs., Inc. v. Wal-Mart

Although not ruled upon by South Carolina courts, our sister courts in North Carolina have recognized that forum selection decisions are immediately appealable. Hickox v. R&G Grp. Int'l, Inc., 588 S.E.2d 566, 567 (N.C. App 2003) ("Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right"); see also In re AIU Ins. Co., 148 S.W.3d 109, 117 (Tex. 2004) (noting refusal to allow immediate appeal of agreed upon forum is "clear harassment"). The Tennessee Court of Appeals provides a logical analysis for a substantially similar case while allowing immediate appeal. Spell v. Labelle, 2004 WL 892534,

---

Stores, Inc., 334 F. Supp. 2d 875, 877-78 (D.S.C. 2004), the District Court of South Carolina enforced a forum selection clause imposed by Walmart for a contract originating in South Carolina and to be performed in South Carolina. While dismissing the action and holding that Arkansas was the proper forum, the court noted: "Plaintiff is a small, closely held South Carolina corporation while defendant, Walmart is a billion dollar corporation. Unequal bargaining power is not a justification in and of itself to hold a provision of a contract invalid. In Carnival Cruise Lines, the U.S. Supreme Court upheld a forum selection clause where the parties were a large corporation and individual plaintiffs even though their sizes were dramatically different . . . A party seeking to escape a forum selection clause must 'show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'"). These issues are addressed by Petitioners in the Initial Brief of Appellants set forth in Appendix pages 1-27.

at *3 (Tenn. Ct. App. 2004) (holding that "an aggrieved party may appeal in the unique situation where the trial court orders arbitration but, sua sponte, reforms the parties' choice of law and forum selection clauses").

Additionally, immediate appeal furthers this Court's precedent in enforcement of arbitration provisions *according to their terms*. "[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted. Thus, the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement." Cape Romain, 405 S.C. at 125-126, 747 S.E.2d at 466 (citations and internal quotations omitted).

The lower court's refusal to enforce the arbitration forum in Texas affects a substantial right of Petitioners. Petitioners should not have to wait until conclusion of proceedings in South Carolina in order for the appellate courts to determine the proper forum.

CONCLUSION

This Court should reverse the decision of the Court of Appeals and either allow this appeal to proceed on the merits

or enforce the arbitration provision in Montgomery County, Texas in accordance with the agreement of the parties.

Respectfully submitted,

Date: December 4, 2017

By: _____

W. Mark White
W. Chaplin Spencer, Jr.
SPENCER & SPENCER, P.A.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
Tel: (803) 327-7191

ATTORNEYS FOR PETITIONERS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

DEC 07 2017

S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-000798
Lower Court Case Nos. 2013-CP-29-00649, -00792

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Petitioners.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc., are the . . . Petitioners.

PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioners by depositing a copy in the United States Mail, postage prepaid, on December 4, 2017, addressed to counsel of record as follows:

J. Cameron Halford
Halford, Niemiec & Freeman, LLP
238 Rockmont Drive
Fort Mill, SC 29708

Leland Greeley
Leland Greeley, P.A.
P.O. Box 2981
Rock Hill, SC 29732

Beth Richardson, Esq.
Elizabeth Gray, Esq.
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, SC 29201

SPENCER & SPENCER, P.A.

Date: December 4, 2017

By: _____

W. Mark White
W. Chaplin Spencer, Jr.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
803/327-7191 - Telephone
803/327-3868 - Facsimile
markwhite@spencerfirm.com

ATTORNEYS FOR PETITIONERS