THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-00260

ARCpoint of Tallahassee, Inc., Greg Bowman d/b/a Bowman Lab Solutions, Inc. d/b/a ARCpoint Labs of Nashville; Gary Patrone d/b/a On Trac Holdings, Inc. d/b/a ARCpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs Of Phoenix – Black Canyon, Employer's Choice Testing, LLC, Michael Gammel d/b/a Blue Lizard, Inc., Florence Ods, Inc., Myrtle Beach Ods, Inc., 3 Sons Ventures, Inc.; Jumpr2, Incorporated, Neil Seltz and Lesly Datlow d/b/a Shamey, LLC,

Respondents,

v.

ARCpoint Franchise Group f/k/a Accudiagnostics, LLC and ARCpoint Occupational Solutions, LLC,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The arbitration provisions are not limited to "disputes between the parties."

ARCpoint's arbitration provisions are broadly worded like the provisions at issue in Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). They can only be construed as limited to "disputes . . . between the parties" by deleting all of the words between "disputes" and "between the parties." The relevant language speaks for itself:

> [A]ll disputes arising out of or relating to this Agreement or to any other agreements between the parties, or with regard to interpretation, formation or breach of this or any other agreement between the parties, shall be settled by binding arbitration. . . .

(Exhibits 1-8), and:

> [A]ll disputes arising out of or relating to this Agreement, to any other agreements between the parties, or with regard to any of the dealings between the parties, shall be settled by binding arbitration. . . .

(Exhibits 9-13).

Although "[i]t is not the function of courts to alter a contract by construction, Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445, 447 (1984), the trial court did just that, and rewrote the parties' contracts by construing these provisions as specifically limited to "disputes . . . between the parties." This erroneous construction was the trial court's basis for finding that the theories set forth in Pearson were not applicable, notwithstanding that the arbitration provisions at issue in Pearson included nearly identical language:

> Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration.

Pearson, 733 S.E.2d at 599.

Moreover, the language of ARCpoint's provisions and the provisions at issue in Pearson are readily distinguishable from the provisions at issue in the two Eleventh Circuit cases cited by

the trial court. The provision at issue in Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc., 845 F.3d 1351, 1353 (11th Cir. 2017), provided:

> [T]he Parties agree that the disputes arising between them concerning the validity, interpretation, termination or performance of the present Contract, should be considered [in] independent arbitration in the State of Florida, United States.

Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc., 845 F.3d 1351, 1353 (11th Cir. 2017). In World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1247 (11th Cir. 2008), the provision was limited to "disputes, claims, controversies or causes of action arising between Franchisee and Franchisor" and expressly excluded its affiliates.

The Kroma court itself acknowledged that it would have reached a different result if the arbitration provision contained language like that found in ARCpoint's provisions:

> If the parties had consented in the arbitration clause to arbitrate any disputes concerning the validity, interpretation, etc., of the contract, instead of consenting to arbitrate only "disputes arising between them" concerning the validity, interpretation, etc., of the contract, the Kardashians may have been able to use equitable estoppel to require Kroma EU to arbitrate the dispute between it and them.

845 F.3d at 1356 (emphasis by court).

The trial court erred in rewriting ARCpoint's broadly-worded arbitration provisions to find Pearson inapplicable.

II. Reading the arbitration provisions as written, any one of the theories set forth in Pearson would allow AOS to compel arbitration as a non-signatory.

A. The Franchise Agreements are integral to the claims against AOS.

The claims against AOS are for conspiring with AFG to alter the terms of the Franchise Agreements and for tortiously interfering with the Franchise Agreements. In the former, the Franchise Agreements are the objects of the alleged conspiracy with AFG. In the latter, the Franchise Agreements are the contracts that AOS allegedly interfered with and procured

breaches of. As shown in the Appellants' opening brief, the Complaint is replete with allegations that support non-signatory enforcement: Respondents rely on, make reference to, incorporate, and presume the existence of the Franchise Agreements in their claims against AOS; they allege a close relationship between AFG and AOS and the alleged wrongs; they allege substantially interdependent and concerted misconduct; and the claims against AOS are intimately founded in and intertwined with the contractual obligations in the Franchise Agreements. *See* Pearson, 733 S.E.2d at 601-603.

B. The theories set forth in Pearson are not dependent on whether the parties contemplated the non-signatory at the time the contract was executed.

Rather than analyzing non-signatory enforcement under the established principles set forth in Pearson, the trial court instead considered the date of incorporation of AOS and concluded that AOS could not compel arbitration because the entity did not exist and therefore was not contemplated by the parties at the time they entered into the contracts. There is simply no support for the trial court's decision to inject this consideration into its analysis of whether AOS could compel arbitration, and doing so would defeat the purpose of allowing non-signatory enforcement.

The theories espoused in Pearson are premised on conduct that occurs subsequent to the date the parties enter into the contract, which is directly at odds with the proposition that a non-signatory must have been contemplated at the time the contract was executed. Whether a non-signatory existed or was contemplated at the time the contract was executed has no bearing on whether subsequent claims against a non-signatory rely on, make reference to, incorporate, or presume the existence of the contract, or the closeness of the relationship to the alleged wrongs, or the degree to which the alleged conduct is interdependent and concerted, or the degree to which the claims are intertwined with the contractual obligations. *See* id. at 601-603.

Indeed, the Pearson court made clear that the theories founded in equitable estoppel require an examination of the parties' conduct after the contract was executed as opposed to the intentions of the parties at the time the contract was executed. In distinguishing equitable estoppel theories from the third-party beneficiary theory, the court observed that,

> [u]nder the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. *Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed.* Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Id. at 602 (*quoting* E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 n. 7 (3d Cir. 2001)) (emphasis added).

AOS has not pursued enforcement under a third party beneficiary theory. Whether AOS existed or was contemplated by the parties to the Franchise Agreements at the time the contracts were executed has no bearing on whether it should be permitted to compel enforcement under the theories set forth in Pearson.

III. The jury trial waiver provision applies to disputes excepted from arbitration; its revocation did not negate the agreement to arbitrate non-excepted disputes.

The arbitration provisions in the Franchise Agreements contain exceptions for "controversies or claims relating to the ownership of any of Franchisor's Marks, the unauthorized use or disclosure of Franchisor's Confidential Information or covenants against competition. . . ." (Mtn. Exhibits 6-7, ¶ 22.7). For those excepted claims and controversies, the parties separately agreed to a mutual jury trial waiver. (Id. ¶ 22.6).

Respondents Florence ODS and Myrtle Beach ODS executed addendums to their Franchise Agreements stating, among other things, "I do not wish to waive our right to a jury trial" and "Do not wish to waive our rights to a jury trial." (Mtn. Exhibits 6-7).

Respondents insist on reading this language in a vacuum. But, when read together with the entire addendum and the contract as a whole, these jury trial waiver revocations do not negate the separate provision providing for arbitration of non-excepted disputes. Indeed, that is what the parties agreed to in the very next sentence of the addendums, that "[n]o other terms or conditions of the above-mentioned contract shall be negated or changed as a result of this here stated addendum." (Id.).

It was Respondents Florence ODS and Myrtle Beach ODS who chose to use this particular language. The language they used tracked the specific provision they intended to revoke, without reference to the separate provision providing for arbitration of non-excepted claims. Both provisions can and should be read together, as intended, to preserve their right to a jury trial in claims that are not subject to arbitration.

Respondents argue that such a reading goes against well-established canons of contract interpretation, but they cite none. To the contrary, there are no rules of construction that would support an isolated reading of a single sentence, which modifies a specific provision in the contract, to negate a separate provision in the contract when the very next sentence states that the parties did not intend to negate any other provisions.

Rather, it is axiomatic that "[t]he purpose of all rules of contract construction is to ascertain the intention of the parties to the contract . . . from the contents of the entire agreement and not from any particular clause thereof." Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977). As the Supreme Court explained some 90 years ago,

> [e]very word in the instrument must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole interpretation. The courts will look to the entire instrument, and, if possible, give such construction that each clause shall have to effect and perform some office.

Bolt v. Ligon, 144 S.C. 218, 142 S.E. 504, 505 (1928).

Construing every clause and provision in the contract to have meaning and effect requires, in this case, reconciling the perceived conflict between the jury trial waiver revocation and the parties' agreement to arbitrate non-excepted disputes. *See* id.; Highlands Prop. Owners Ass'n, Inc. v. Shumaker Land, LLC, 397 S.C. 432, 438, 724 S.E.2d 685, 688 (Ct. App. 2012) ("[W]here possible, all language used should be given a reasonable meaning."); Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (provisions in a contract should be reconciled "to give effect to all of their provisions, if practical."); Hays v. Adair, 267 S.C. 291, 296, 227 S.E.2d 665, 667–68 (1976) ("A proper construction seeks to harmonize the various provisions[,] and a construction which gives meaning to all should be preferred over one which renders some provisions meaningless.").

Contrary to Respondents' argument that the waiver revocations are in direct conflict with the arbitration provision, they can be reconciled by construing the language as intended, to preserve the right to a jury trial in those claims and controversies that are not subject to mandatory arbitration. If Respondents intended to revoke their agreement to arbitrate non-excepted disputes, they should have done so by specific reference to the arbitration provision in the contract. "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). *See* id. ("If the Rabons intended that 'income tax' refers to 'withholding tax' they should have changed the provision to accord with their intention.").

Moreover, because Respondents Florence ODS and Myrtle Beach ODS were responsible for this particular language, any uncertainty about whether the parties intended for this language to negate the arbitration provision should be resolved against them. Myrtle Beach Lumber Co. v.

Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) ("[A]ny ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or *is responsible for the verbiage.*") (emphasis added). *See also* Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. [U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

CONCLUSION

For the reasons stated above and in Appellants' opening brief, Appellants respectfully submit that the trial court erred in finding the arbitration provisions inapplicable to the claims against AOS and in finding that two franchisees' revocations of jury trial waivers amounted to revocations of the separate agreements to arbitrate. The Court should reverse the trial court's denial of Appellants' motion and find that all of Respondents' claims against both Appellants are subject to mandatory arbitration.

[SIGNATURE PAGE FOLLOWS]

This 17th day of May, 2018.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellants** upon Respondents by depositing a copy of same in the United States Mail, postage prepaid, on May 17, 2018, addressed to Respondents' attorneys of record as follows:

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May 17, 2018

The Honorable Jenny Abbott Kitchings
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Re: ARCpoint of Tallahassee, Inc., *et al.* v. ARCpoint Franchise Group, LLC, *et al.*
Greenville County Case No.: 2017-CP-23-3986
Appellate Case No.: 2017-002260
EO File No.: 120-308

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Reply Brief of Appellants, and proof of service of the same.

By copy of this correspondence, I have served the same upon all counsel of record. If you have any questions or concerns, please do not hesitate to contact me. Thank you in advance for your attention to this matter.

Sincerely,

MICHAEL B. McCALL

MBM/kjj
Enclosures
cc: Joshua L. Howard, Esq.
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