

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2016-CP-40-7402

Madison Cone, individually and on behalf)
of Tower Street Capital Management, Inc.,)

Plaintiff,)

vs.)

Curtis C. Stewart, Atlantic Intermediaries,)
LLC, Allstar Financial Group, Inc., and)
Tower Street Capital Management, Inc.)

Defendants.)

**ORDER GRANTING MOTION
TO STAY ARBITRATION**

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JUL 12 2018
SC Court of Appeals

This matter comes before me on Motion of Defendants Atlantic Intermediaries, LLC, (“Atlantic”) and Allstar Financial Group, Inc., (“Allstar”) for Relief from Existing Stay and Request for Preliminary and Permanent Injunction Pursuant to Rule 65 of the South Carolina Rules of Civil Procedure. In short, Atlantic and Allstar requests that this Court revisit a prior order staying these proceedings and compelling the case into arbitration in order to lift the stay and enter an order enjoining the arbitration proceedings from going forward pending an appeal from orders entered in the arbitration proceeding. For the reasons set forth herein, the motion is **GRANTED**.

Background

1. This action arises out of the former business relationship between Atlantic and Tower Street Capital Management, Inc. (“Tower”) and the principals for these entities.
2. Atlantic is a wholly owned subsidiary of Allstar.
3. Atlantic and Allstar are brokers for reinsurers and insurers.
4. On December 11, 2012, Atlantic entered into a written “Finder’s Fee Agreement” with Tower.

5. Tower is a South Carolina limited liability company which is owned 45% by Plaintiff Madison Cone (“Cone”), 45% by Defendant Curtis C. Stewart (“Stewart”) and 10% through a non-voting interest held by a third party, Reginald W. Boylston (“Boylston”).

6. Through their business relationship, Tower was engaged through the Finder’s Fee Agreement for the purpose of locating reinsurance carriers who were willing to cover certain lines of insurance which were being sold by Atlantic and underwritten by Allstar.

7. The Finder’s Fee Agreement was succeeded by a Consulting Agreement which is nominally between Tower and Atlantic and is dated January 31, 2014 (“Consulting Agreement”).

8. Substantial monies were paid to Tower on a monthly basis under both the Finder’s Fee Agreement and Consulting Agreement. By virtue of their ownership, Cone and Stewart benefitted from both agreements.

9. In or about July 2016, the ownership structure of Atlantic changed and the new owners of Atlantic began negotiations with Tower to alter the Consulting Agreement and its financial terms. At the time it was communicated to Tower that the Consulting Agreement was terminated effective July 1, 2016 because of the change of Atlantic’s ownership. On or about January 13, 2017, Atlantic confirmed once again in writing the July 2016 termination of the Consulting Agreement to Tower.

10. At some time during the fall of 2016, the negotiations between Tower and the new owners of Atlantic broke down. Subsequently, Cone filed the within action asserting a number of causes of action flowing from the dissolution of the business relationship between Atlantic and Tower.

11. On July 11, 2017, this Court entered an Order Staying This Action and Compelling Arbitration in Part (“Order Compelling Arbitration”).

12. Following the Order Compelling Arbitration, AAA arbitration was commenced and was assigned to Arbitrator John Sherrill under AAA Case No: 01-17-0005-1287.

13. In the course of discovery, Cone sought to compel production of 110 otherwise privileged attorney-client communications between Atlantic and its legal counsel, Eric S. Bland (“Bland”), many of which involve the contracts which are the subject matter of the arbitration.

14. Cone contended that the communications were discoverable under the crime / fraud exception to the attorney-client privilege, even if Bland were an unwitting participant in alleged fraudulent or criminal conduct by his clients.

15. By Order dated April 16, 2018, Arbitrator Sherrill clarified that he was not considering any crime component of the crime / fraud exception to the attorney-client privilege by stating in part: “... I have made the point that we are not looking at a potential crime in this situation.”

16. Through the same Order, Arbitrator Sherrill appointed a Special Referee, Hal Gray, to conduct an in-camera review of the 110 privileged documents for the purpose of determining whether they were discoverable.

17. Allstar and Atlantic then requested a full evidentiary hearing in order to present all of the facts and circumstances of the communications such that a proper context could be afforded for purposes of the review, but the request for a full hearing and/or oral argument before the Special Referee was denied.

18. On May 3, 2018, in an unreasoned two-page decree, Special Referee Gray ordered the invasion of Allstar’s and Atlantic’s attorney-client privilege and directed the production of numerous attorney-client privileged documents to the Plaintiff. The decree contained

inconsistencies with regard to the matters which were deemed privileged and those for which the privilege was deemed waived.

19. On May 7, 2018, Bland emailed Arbitrator Sherrill as follows:

... the Respondents will be taking a direct appeal from Special Referee Gray's May 3, 2018 order regarding the privileged documents at issue to the circuit court which on August 1, 2017 stayed the matter and compelled it into arbitration. Mr. Gray's order is deficient in a number of material respects which affects the substantial rights of the Respondents ...

20. On May 8, 2018, Sherrill responded to Bland's email in part as follows:

... As you know, in accordance with the arbitration agreement between the parties that "all claims, demands, disputes, controversies, differences or misunderstandings between the parties...shall be settled by arbitration," Judge Hood of the Circuit Court granted your clients' Motion and ordered this case to arbitration on July 10, 2017. Therefore, until the court's referral order is rescinded or modified, this arbitration will proceed as set forth in the current Scheduling Order, including the final evidentiary hearing on June 11-15, with or without the participation of your clients...

21. On May 8, Sherrill went further and stated:

...if Defendants do not get relief from the stay by Wednesday May 16, 2008 "I will order them produced as set forth in Mr. Gray's order (on Wednesday May 16th)."

22. After being informed of Allstar's and Atlantic's motion seeking a stay of the arbitration, Arbitrator Sherrill indicated that he would wait and see whether a hearing on the injunction is scheduled before proceeding further.

Arguments

23. Allstar and Atlantic contend that the manner in which the attorney-client privilege has been handled through the arbitration has been arbitrary and capricious and handled in a manifest disregard of the law.

24. Moreover, Allstar and Atlantic contend that the decree compelling the production of attorney-client privileged communications is immediately appealable in that it a) impacts the

substantial right of Allstar and Atlantic to select counsel of their own choosing and that it b) impacts the substantial right to protect attorney-client communications by denying Allstar and Atlantic the procedural safeguards to which they would otherwise be entitled.

25. Cone contends that by both agreement and statute, the Special Referee's decree is not immediately appealable because it is not a final award, and arbitration may only be taken from a final award.

26. Cone further contends that no substantial right is invaded by the Special Referee's decree in that Cone does not seek to disqualify Bland as an attorney of record in the arbitration.

Findings of Fact and Conclusions of Law

27. Based on the foregoing, as well as on the full record before me, I hereby find and order as follows.

28. This action was stayed, but not dismissed, by prior order of this Court.

29. I find that this Court has jurisdiction to revisit its order staying this action and to entertain the present motion for an injunction both as a matter of law and as a matter of contract between the parties.

30. As it pertains to the Consulting Agreement which contains the arbitration provision giving rise to the arbitration itself, the Consulting Agreement compels into arbitration all disputes arising out of the Agreement itself "[e]xcept those matters relating to a party's right to obtain injunctive relief." By agreement, the parties have stipulated to this Court's continuing jurisdiction to entertain injunctive relief.

31. Allstar and Atlantic seek an injunction preventing the arbitration proceedings from going forward pending the outcome of an appeal from the decree of the Special Referee.

32. In light of an indication by Arbitrator Sherrill that he intends for the arbitration to proceed with or without the participation of Allstar and Atlantic and in light of my finding below that the issues presented by Allstar and Atlantic are immediately appealable as they involve substantial rights, I hereby find and order that the imposition of an injunction to prevent the arbitration from going forward during the appellate process is warranted.

33. In granting the injunction, I find that Allstar and Atlantic will suffer immediate irreparable harm if the relief is not granted, that the movants have a reasonable possibility of achieving success on the merits, that the movants will suffer more harm if the preliminary relief is not granted than Cone will suffer if the relief is granted, and the public interest will benefit by the relief granted.

34. I find that Special Referee Gray's decree compelling the production of attorney-client privileged communications is immediately appealable.

35. In accordance with Section 15-48-200 of the South Carolina Uniform Arbitration Act, an appeal may be taken from a "judgment or decree" entered in arbitration and that such appeals are to be taken "in the manner and to the same extent as from orders or judgments in a civil action." Thus, the issue before the Court is whether the Special Referee's decree would be immediately appealable had it been entered in a civil action. I find that it would be immediately appealable.

36. Pursuant to South Carolina Code Section 14-3-330(3), the Supreme Court has appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal "a final order affecting a substantial right made in any special proceedings."

37. I find that Special Referee Gray's decree is a final order affecting the substantial rights of Allstar and Atlantic.

38. In Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005), our Court held that an order granting a motion to disqualify a party's attorney in a civil action affects a substantial right and is immediately appealable.

39. While Cone contends that he does not seek to disqualify Bland, the issue is whether an order invading the privilege enjoyed between Bland, Allstar and Atlantic "affects" a substantial right of Allstar and Atlantic.

40. I find that the same right that impressed the Court in Hagood is present here. Allstar and Atlantic's right to be represented by their preferred counsel, Bland, is a substantial right and that right is clearly impacted by a decision to invade the privilege. Will Allstar and Atlantic be forced to call Bland as a witness? Will Bland's ability to represent be curtailed or limited if he is forced to become a witness? Has the invasion of the privilege made Bland a necessary witness to the proceedings? None of these considerations were present before the order of the Special Referee. All of these considerations are present now and each has the potential to invade the right of Allstar and Atlantic to choose its preferred legal counsel.

41. It is not necessary that Cone seek to disqualify Bland in order for the Special Referee's decree to "affect" the right of Allstar and Atlantic to select counsel of their choosing. Clearly, the right is affected.

42. Allstar and Atlantic further contend that the attorney-client privilege itself is a substantial right and that the invasion of the right is immediately appealable in the present case because the method used in the arbitration to invade the privilege denied them certain procedural safeguards to which they were entitled.

43. In Tucker v. Honda of South Carolina Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003), an appeal was taken from an order compelling a witness to answer questions which may

involve the attorney-client privilege. The appellant contended in part that the order was immediately appealable because it affected the attorney-client privilege and thereby must also impact the merits of the case. In rejecting the argument, the Court held:

In addressing the Tuckers' first contention, we note an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. *See Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a **407 party in contempt. *See Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999). Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal. *See Ex parte Whetstone, supra*.

Pee Dee has not refused to comply with the order but appeals the mere issuance of the order. Pee Dee's appeal is interlocutory.

44. Thus, in Tucker the procedural safeguard was the ability of the party being compelled to reveal allegedly privileged communication to refuse to comply and to allow the matter to mature to a finding of contempt which would then become immediately appealable.

45. The Tucker decision is in accord with the United States Supreme Court in Mohawk Industries v. Carpenter, 130 S.Ct. 599 (2009). In addressing the issue of whether an order invading the attorney-client privilege represents a substantial right so as to be immediately appealable, the Supreme Court held in part that the matter is not immediately appealable given the other procedural safeguards that are available:

Moreover, litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of immediate review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involving "a controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of the litigation." § 1292(b). Second, in extraordinary circumstances where a disclosure order works a manifest injustice, a party may petition the court of appeals for a writ of mandamus. *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459. Another option is for a party to defy a disclosure order and incur court-imposed sanctions that, e.g., "direc[t] that the matters embraced in the order or other designated facts be taken as established," "prohibi[t] the disobedient party from supporting or opposing designated claims or

defenses,” or “strik[e] pleadings in whole or in part.” Fed. Rule Civ. Proc. 37(b)(2). Alternatively, when the circumstances warrant, a district court may issue a contempt order against a noncomplying party, who can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment. See, e.g., *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18, n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313. These established appellate review mechanisms not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk’s concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship.

46. No such safeguards are available to Allstar and Atlantic given the manner in which the privilege was invaded in the present case.

47. Given the lack of procedural safeguards and the expressed intention to proceed with the arbitration, I find that the imposition of an injunction in order to permit Allstar and Atlantic to appeal the decree of the Special Referee is the only appropriate means of protecting the interests of all parties pending the outcome of the appellate process.

Conclusion

For the reasons set forth herein above, **I HEREBY FIND AND ORDER** that the stay of these proceedings is lifted and that the arbitration proceedings previously ordered are stayed pending an appeal from decree of the Special Referee entered in the arbitration proceeding.

IT IS SO ORDERED.

Honorable Robert E. Hood

Columbia, South Carolina

_____, 2018



Richland Common Pleas

Case Caption: Madison Cone , plaintiff, et al vs Curtis Stewart , defendant, et al

Case Number: 2016CP4007402

Type: Order/Other

So Ordered

s/ R.E. Hood #2164

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