

much more, to establish waiver of arbitration. *Rich*, 357 S.C. at 71, 590 S.E.2d at 510. Material factors to consider when determining whether the non-moving party was prejudiced, are delay and whether the party requesting arbitration took advantage of the judicial system by engaging in discovery. *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 250; *Rich*, 357 S.C. at 71, 590 S.E.2d at 510.

Defendant Ludy does not waive the right to arbitrate. Although Defendant Ludy filed a Complaint against Plaintiff Charing on April 25, 2017 in the Court of Common Pleas for Lexington County, South Carolina, this act in and of itself, is insufficient to waive Defendant Ludy's right to compel arbitration. On May 10, 2017, in response to Defendant Ludy's Lexington County Complaint, Plaintiffs initiated the instant action in the Court of Common Pleas for Richland County, South Carolina. On June 6, 2017, Defendant Ludy dismissed the Lexington County Complaint and responded to Plaintiffs' Richland County Complaint by filing a Motion to Dismiss or Stay and Compel Arbitration. In an abundance of caution, Defendant Ludy filed an Answer and Counterclaim on July 14, 2017 and noted in the pleading that the Court must decide his Motion to Dismiss or Stay and Compel Arbitration before considering his Answer and Counterclaim.

The Court considered many factors to determine Defendant Ludy has not waived the right to compel arbitration. This lawsuit commenced in May 2017 and Defendant Ludy filed the motion to compel arbitration on June 6, 2017. Between the commencement of the lawsuit and the request for arbitration, the parties engaged in minimal discovery. Further, Defendant Ludy has not utilized the judicial system to his advantage by filing extensive discovery requests or by engaging in discovery. On the contrary, Defendant Ludy filed a Motion to Limit and Stop Discovery on May 30, 2018, so that the Court may first determine whether this case is subject to arbitration. Such a filing is consistent with his request to compel arbitration. Last, Plaintiffs present no arguments as

to how Defendant Ludy's motion to compel arbitration prejudices them. Taken as a whole, the actions of Defendant Ludy do not prejudice Plaintiffs and are consistent with the request to compel arbitration.

Second, this Court finds that Plaintiffs' causes of action numbers one and two are subject to arbitration. The Plaintiffs' first cause of action is Palmetto Wildlife Extractors' Derivative Claim for Breach of Fiduciary Duty. The Plaintiffs' second cause of action is Palmetto Wildlife Extractors' Derivative Claim for Aiding and Abetting Breach of Fiduciary Duty. With regard to Plaintiffs' first two causes of action, Plaintiffs claim that Defendant Ludy misappropriated company funds in a manner inconsistent with the best interests of the company and utilized company funds for personal use. Plaintiffs additionally claim that Defendants removed Plaintiffs from the company's bank accounts. Plaintiffs and Defendant Justin Ludy entered into an Amended Operating Agreement for Palmetto Wildlife Extractor's, LLC. By virtue of the contract, the Plaintiffs and Justin Ludy are ascribed certain fiduciary duties. An alleged violation of a fiduciary duty falls under the scope of the parties' operating agreement, which requires that disputes relating to, or arising out of the contract, are subject to arbitration.

Third, this Court finds that Plaintiffs' causes of action numbers three through five are not subject to arbitration. The Plaintiffs' third cause of action is for Civil Conspiracy. The Plaintiffs' fourth cause of action is for Defamation. The Plaintiffs' fifth cause of action is for Appointment of Receiver, Accounting, and Judicial Dissolution. Plaintiffs' claims for civil conspiracy and defamation are tort claims that do not implicate the parties' contractual agreement and are not subject to arbitration. According to Section 11.1.3 of the parties' agreement, a court must enter a judicial decree dissolving the company pursuant to S.C. Code Ann. § 33-44-801. Thus, Plaintiffs'

claim for appointment of receiver, accounting, and judicial dissolution is not subject to arbitration as Section 11.1.3 specifically requires a finding by a court.

IT IS HEREBY ORDERED

Defendant Ludy's motion is GRANTED as to Plaintiffs' causes of action for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. Those causes of action are dismissed and subject to arbitration. Defendant First Community Bank Corporation will follow the parties to arbitration.

Defendant Ludy's motion is DENIED as to Plaintiffs' claims for civil conspiracy; defamation; and appointment of receiver, accounting, and judicial dissolution. These causes of action are stayed.

The Honorable DeAndrea G. Benjamin
Judge of the Fifth Judicial Circuit

June _____, 2018
Columbia, South Carolina



Richland Common Pleas

Case Caption: Palmetto Wildlife Extractors LLC , plaintiff, et al vs Justin Ludy ,
defendant, et al
Case Number: 2017CP4002822
Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161