THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

DeAndra Gist Benjamin, Fifth Circuit Judge

Appellate Case No. 2018-001536

Palmetto Wildlife Extractors, LLC,
And Patrick Charping, Respondents,

v.

Justin Ludy and First Community Corporation d/b/a,
First Community Bank,

Appellants,

Of whom Justin Ludy is the Appellant.

FINAL BRIEF OF APPELLANT

Wesley D. Few, LLC
Post Office Box, 9398
Greenville, SC 29604
(864) 527-5906
wes@wesleyfew.com

ATTORNEY FOR APPELLANT JUSTIN LUDY

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STATEMENT OF ISSUE(S) ON APPEAL

I. WHETHER AN ARBITRATION AGREEMENT INCLUDED IN THE PARTIES' OPERATING AGREEMENT REQUIRING ARBITRABILITY OF CLAIMS TO BE DECIDED BY THE ARBITRATOR MUST BE ENFORCED AS AGREED.

II. WHETHER PLAINTIFFS' / RESPONDENTS' RELATED CLAIMS 3, 4 AND 5 (AND THE DEFENDANT / APPELLANT'S COUNTERCLAIMS) MUST BE DECIDED IN ARBITRATION IN VIEW OF THE ABOVE PROVISION IN THE PARTIES' OPERATING AGREEMENT AND IN VIEW OF APPLICABLE CASE LAW IN SOUTH CAROLINA ADDRESSING THE RELATEDNESS OF CLAIMS IN ARBITRATION.

STATEMENT OF THE CASE

This is an appeal from an order granting in part and denying in part a motion to dismiss or stay and compel arbitration. The gist of the underlying action is a partner / member dispute over the LLC-entity, Plaintiff / Respondent Palmetto Wildlife Extractors, LLC.

The lower court order being appealed granted Appellant's motion to compel arbitration with respect to Plaintiff / Respondent Palmetto Wildlife Extractors, LLC's claims 1 and 2, namely [Claim 1] as a "Derivative Claim for Breach of Fiduciary Duty," and [Claim 2] as another "Derivative Claim for Aiding and Abetting a Breach of Fiduciary Duty." (R. pp. 4). Appellant's motion to dismiss or stay and compel arbitration was denied as it related to Plaintiffs / Respondents' claims 3, 4 and 5, respectively Plaintiff / Respondent Charping's [Claim 3] for "Civil Conspiracy," and [Claim 4] for "Defamation Against Ludy," and Plaintiffs' / Respondents' [Claim 5] for "Appointment of Receiver, Accounting and Judicial Dissolution" (R. pp. 4).

FACTS AND PROCEDURAL HISTORY

On or about October 13, 2014, Plaintiff / Respondent Patrick Charping ("Respondent Charping") and Defendant / Appellant Justin Ludy ("Appellant" or "Ludy") executed the Operating Agreement for Plaintiff / Respondent Palmetto Wildlife Extractors, LLC ("Respondent PWE") (R. pp. 240-255). Ludy had already formed and operated the business, and Charping was coming in as a new partner in 2014. The Operating Agreement ("Agreement") provided for ownership on a 50/50 basis, however, Ludy maintained a 51% "Governance Interest," as shown in *Exhibit A* to the Agreement. (R. pp. 107). Additionally, the Agreement provided at Section 12.14, as follows:

12.14. Arbitration. Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with South Carolina Code Sections 15-48-10, et. seq. and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding. Legal costs, attorneys' fees, and the fees of expert witnesses may be assessed against any person found to have acted in bad faith. All arbitration proceedings shall be conducted by a panel of three arbitrators. The party requesting arbitration shall have the right to select one arbitrator and the person or persons on the other side of the controversy shall select a second arbitrator. The two arbitrators so chosen shall select the third.

(R. pp. 160, 249). (underlining emphasis added).

Plaintiffs' filed the underlying action on May 10, 2017 (R. pp. 40-54). Defendant / Appellant Ludy filed his motion to dismiss or stay and compel arbitration on June 6, 2017 (R. pp. 92-110). A hearing on the motion was apparently delayed due to some confusion about whether or not the case had been sent to the Business Court. As a result of that apparent confusion, the motion was not set for a hearing until January 3, 2018, which was then delayed further due to the weather that day (*i.e.,* snow). The arbitration motion was then heard on March 1, 2018. On March 5, 2018, the lower court issued a Form 4 advising the motion was "under advisement."

On June 21, 2018, the lower court issued its order granting in part and denying in part the motion to compel arbitration 2017 (R. pp. 1-5). On June 30, 2018, Appellant filed a motion to reconsider, which was denied by an order dated July 23, 2018 (R. pp. 6-8).

STANDARD OF REVIEW

An "Appeal from the denial of a motion to compel arbitration is subject to de novo review." *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005).

ARGUMENT

This appeal presents two questions:

1. Whether the lower court erred in not addressing the Parties Agreement which expressly provided "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding"?
2. Whether the lower court erred in finding that Plaintiffs' / Respondents' Claims 3, 4 and 5 were not related to the Parties' Operating Agreement?

The Circuit Court erred in not addressing the parties' Agreement providing that "any dispute" about arbitrability would be decided in arbitration. The lower court's order failed to address this provision in its order or in the order denying the motion for reconsideration.

The lower court's order denying arbitration of claims 3, 4 and 5 was erroneous and failed to give sufficient analysis of the relatedness of the claims prior to "concluding" the claims were unrelated because claims 3 and 4 were "tort" claims and finding that claim 5 seeking an accounting / dissolution of the LLC entity was not related to the Operating Agreement.

I. THE LOWER COURT ERRED BY NOT ADDRESSING THE FACT THAT THE PARTIES' ARBITRATION AGREEMENT REQUIRED ISSUES RELATED TO ARBITRABILITY OF CLAIMS TO BE DECIDED BY THE ARBITRATOR.

The lower court's order fails to address that portion of the parties' Agreement providing as follows: "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." (R. pp.160, 249). Instead, the lower court mostly addressed whether or not Appellant Ludy had waived his right to compel arbitration, then finding he had not. The remainder of the lower court order, consisting of a single paragraph, concluded

that claims 3, 4 and 5 were unrelated to the Operating Agreement, and, therefore, not subject to arbitration under the Agreement. (R. pp. 3-4).

The grounds for this appeal relate to the fact that the lower court order does not address the "relatedness" of the Plaintiff's three claims (claims 3-5) that were stayed and not compelled to arbitration, and our Supreme Court's decision in *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 597, 553 S.E.2d 110, 119 (2001), which required even tort claims be arbitrated with the LLC claims. *Id.* (holding "Further, any tort claims between the partners that relate to the partnership agreement are arbitrable.").

In *MBNA Am. Bank v. Christianson*, 377 S.C. 210, 212-213, 659 S.E.2d 209, 210-211 (Ct. App. 2008), this Court held, "Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination." *Id.* (citing *Zabinski*). Here, the above-quoted provision from 12.14 of the Agreement (R. pp. 160, 249) shows the parties / members in the LLC agreed that all disputes regarding arbitration would be submitted to the arbitrator(s).

In *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994), the court interpreted the provisions of the Federal Arbitration Act, 9 U.S.C. § 3, and stated:

> A court asked to stay litigation pending compulsory arbitration must engage in a four-step inquiry:
>
> First, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be non-arbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration.

Id.

Here, the lower court failed to ascertain the scope of the parties' arbitration agreement and failed entirely to consider that the parties had expressly agreed that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding," which text also serves to define the scope of the arbitration agreement. (R. pp. 160, 249).

II. THE LOWER COURT ERRED BY "CONCLUDING" CLAIMS 3, 4 AND 5 WERE "UNRELATED" TO THE PARTIES OPERATING AGREEMENT.

As noted above, the Circuit Court's order concluded as follows with respect to the "un-relatedness" of the Plaintiffs' Claims 3, 4 and 5:

> 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.

(R. pp. 3-4).

That is all the analysis provided by the lower court prior to concluding that claims 3-5 must be decided in a completely separate forum, presumably after the members / parties, go through an arbitration on claims 1 and 2. Additionally, the lower court order fails to address the relatedness of any counterclaims, or third-party claims, or other claims that may arise in amendments to the pleadings or statement of the claims in arbitration.

An analysis of these three claims as plead shows that these claims are not unrelated

claims and relate to the parties relationship as former partners in the entity known as Palmetto Wildlife Extractors, LLC ("PWE"). For example, Charping's Claim 3 alleging a Civil Conspiracy is based upon facts directly related to the division / running of the LLC. Paragraphs 43 and 44 allege:

> 43. Defendants Ludy and First Community Bank have conspired and joined together for the purpose of injuring Plaintiff Charping.
>
> 44. The actions undertaken jointly by Defendants have resulted in Charping's ouster from Palmetto Wildlife Extractors, thereby causing the dissolution of Palmetto Wildlife Extractors.

(R. pp. 50-51).

Similarly, Charping's Claim 4, alleging Defamation of Character, is based upon facts directly related to the division / running of the LLC, for example, alleging as follows:

> 51. Specifically, on April 5, 2017, Ludy sent a text message stating that Charping "has embezzled over $50,000 from the company he used to be a part of. It's a criminal offense and action is already taken." This statement is libelous and therefore actionable *per se*.
>
> 52. That same day, shortly after removing Plaintiff Charping from Palmetto Wildlife Extractors, Defendant Ludy posted the following on social media: "Three ways to be removed from my life: 1. Steal from me; 2. Lie to Me; 3. Gossip about me." This statement is defamatory *per quod*; is libelous, and therefore, actionable per se.

(R. pp. 50-52).

Most of the times when a dispute exists between partners that results in litigation / arbitration, it can be expected that one partner or the other will have alleged at some point in time that the other took money from the company improperly.

Finally, Charping's Claim 5 for Accounting / Receivership / Dissolution originates in part from the LLC code itself, and is also related to the Operating Agreement. In support of this

claim, Charping alleges:

> 57. Plaintiffs Charping and Palmetto Wildlife Extractors seek an order pursuant to S.C. Code Ann. § 33-44-801 dissolving Palmetto Wildlife Extractors on one or more of the following grounds:
>
> a. another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on: the company's business with that member;
>
> b. it is not otherwise reasonably practicable to carry on the company's business in conformity with the Articles of organization and the operating agreement; and
>
> c. the member in control of the company has acted, is acting, or will continue to act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to Plaintiff Charping.

(R. pp. 52).

Each of the three stayed claims relates to the parties' relationship as former partners in Respondent PWE.

The lower court order fails to address our state's precedent favoring arbitration of claims and that same policy of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3. *See e.g., General Equipment & Supply Co., Inc. v. Keller Rigging & Const., SC, Inc.*, 344 S.C. 553, 555, 544 S.E.2d 643, 645 (Ct. App. 2001) (stating, "Furthermore, it is the policy of this state to favor arbitration of disputes."); and *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (holding, "It is the policy of this state and federal law to favor arbitration and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'"). In *Landers*, our Supreme Court reversed the trial court's order splitting claims that would go into arbitration in a case interpreting an employment contract arbitration provision. *Id.* at 218 (concluding "In conclusion, we reverse the trial court with respect to each of Landers' remaining

four causes of action[1] and hold that each is subject to arbitration.").

Splitting the claims that will go to arbitration creates confusion amongst the parties and will impede settlement, as one party or the other may believe they will get a better result when the stayed claims come back for a second round of litigation amongst the same parties. Additionally, as noted above, the order fails to address in which forum the pending counterclaims or any added / amended claims will be adjudicated.

Such splitting also creates confusion in the event one of the parties seeks to amend their pleadings during the discovery period, as the proposed amended claims will also be the subject of a dispute between the parties as to whether not they are subject to litigation in the courts or in arbitration. Requiring parties to litigate related disputes in two different forums is also inefficient and contrary to the intent of the state and federal policies favoring arbitration.

To address these types of concerns, the parties agreed in their Operating Agreement as quoted above that, "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." (R. pp. 160, 249). Mr. Charping now wishes to ignore those very words that he agreed to when he signed the Operating Agreement.

The Order states that "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." (R. pp. 3-4). Appellant would respectfully assert that the above-quoted concern is addressed by the provisions of S.C.

[1] The four causes of action split out by the trial court in *Landers* included: (i) slander, (ii) intentional infliction of emotional distress, (iii) illegal proxy solicitation, and (iv) wrongful expulsion as a director. *Id.* at 218.

Code Ann. § 15-48-120, providing for "confirmation of an award" in arbitration in this Court. *See e.g., Mills v. William Clarke Jeep Eagle*, 321 S.C. 150, 152, 467 S.E.2d 268, 269 (holding, "Once the motion to confirm was filed, the circuit court resumed jurisdiction of the case," and also stating "[t]o request modification or clarification after the motion to confirm was filed, Clarke was required to move the circuit court to submit the award to the arbitrators for modification."). Accordingly, the Uniform Arbitration Act provides that the arbitration tribunal decides the issues in dispute between the parties and the court is still available to enforce the arbitrator's award, as may be interpreted and modified by the arbitration tribunal, just the same as if it were a decision of the court.

CONCLUSION

For at least the reasons set forth herein, Appellant respectfully requests that this Court find that all pending claims are related claims, reverse the lower court and send all pending claims (and counterclaims) in the case to arbitration consistent with our Supreme Court's holdings in *Zabinski* and *Landers*, and consistent the agreement between the parties to submit all claims to arbitration.

Respectfully submitted,

Wesley D. Few, LLC
Post Office Box, 9398
Greenville, SC 29604
(864) 527-5906
wes@wesleyfew.com

ATTORNEY FOR APPELLANT JUSTIN LUDY

Greenville, South Carolina
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Wesley D. Few, LLC
Post Office Box, 9398
Greenville, SC 29604
(864) 527-5906
wes@wesleyfew.com
ATTORNEY FOR APPELLANT JUSTIN LUDY

Greenville, South Carolina

May 8, 2019