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 REPLY BRIEF OF APPELLANT

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REPLY

Respondent agrees with Appellant that "[t]his matter arises out of a dispute between two business partners, Appellant Ludy and Respondent Charping." (Brief of Resp. at page 1 of 9, Statement of Case). Here, there are no separate disputes set out in Respondent's lawsuit that are not directly related to the partnership relationship between Messrs. Ludy and Charping. Respondent's position is simply to request that the order of the lower court be accepted in its unsupported conclusion that, "[p]laintiffs' claims for civil conspiracy and defamation are tort claims that do not implicate the parties' contractual agreement and are not subject to arbitration." (R. pp. 3-4).

Respondent continues to seek affirmation of the lower court's order without citing to the case or applying the test from the leading case on the subject of arbitrability of related claims, namely *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110, 118-19 (2001). Respondent avoids citing *Zabinski*, which Appellant has relied upon since the motion hearing on March 1, 2018. Instead, Respondent relies upon *Simpson v. World Finance*, 367 S.C. 184, 623 S.E.2d 877, 881 (Ct. App. 2006), for its conclusion that the stayed claims are "independent," of the Operating Agreement / LLC") (R. pp. 240-255). Respondent provides no analysis of the facts they plead in their underlying lawsuit claims for Civil Conspiracy and Defamation. Additionally, the case that Respondent relies upon, *Simpson* cites *Zabinski* with approval of the test for arbitrability of related claims. *Id.* at 879 (stating, "Our supreme court has outlined the analytical framework for determining whether a particular claim is subject to arbitration." (citing *Zabinski*)).

The Court of Appeals in *Simpson* then quotes *Zabinski*, as follows:

> To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. []. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. []. Furthermore, unless 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. []. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. [] The court further articulated that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained."

Id. at 879-880 (underlining emphasis added, citations omitted).

Respondent cites to its Verified Complaint (R. pp. 40-54) repeatedly at pages 1-4, and 7-8 of its Brief, however, Respondent never addresses the specific factual allegations identified by Appellant from the Respondent Plaintiff's Complaint at Paragraphs 43-44 and 51-52. (R. pp. 50-52). (Brief of Appellant, at 6-7). This is because the relatedness of claims 3 and 4 are shown by the Respondent's own factual allegations.

Simpson next quotes *Zabinski*, as follows:

> The test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.

Id. at 880.

Respondents rely on their lack of analysis of the above-quoted "significant relationship" test applied in *Simpson* as taken from *Zabinski* to conveniently conclude that their claims 3 and 4 are "independent," and not "interwoven." *Id.* at 7 of 9. This conclusion is reached without analysis of Respondent's own pleadings, for example, at Paragraphs 43-44 and 51-52 of their Complaint. (R. pp. 50-52) (asserting Defendant Bank and Appellant Ludy conspired to cause the

"ouster" of Charping from the company / LLC, and that Appellant Ludy defamed Respondent Charping by accusing him of "embezzle[ing]" from the LLC). Accordingly, an analysis of the Respondent's allegations in their claims shows that claims 3 and 4 are, at a minimum, "susceptible to an interpretation that covers the dispute." *See e.g., Simpson*, 623 S.E.2d at 879; and *Zabinski*, 553 S.E.2d at 118.

Additionally, Respondents (and the lower court) have failed to acknowledge or attempt to explain that portion of *Zabinski* which holds, "The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Id.* at 118 (citations omitted). As noted in Appellant's Initial Brief, the parties' arbitration agreement between provides as follows: "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." *Id.* at 3 (citing Arbitration Agreement, at § 12.14 (R. pp. 160, 249)). Accordingly, *Zabinski* also requires that the arbitration panel / arbitrators initially decide which claims are even subject to arbitration, as expressly agreed by the parties.

Assuming Appellant Ludy and Respondent Charping had a separate dispute about, for example, an unrelated: (i) interest in a hunt club, (ii) a bar brawl, (iii) a traffic accident, or (iv) Appellant Ludy accusing Respondent Charping of stealing from a non-company bank account, then there could be a need for further analysis of the alleged unrelatedness of the claims in the Respondent's lawsuit under *Zabinski* and its progeny. Here, however, Respondent's pleading shows that Respondent's claims relate directly to the parties' interest in the underlying LLC. This is the same LLC that is the subject of the parties' Operating Agreement, which contains the broadly worded arbitration provision providing jurisdiction to decide arbitrability to the arbitrators.

Respondent's reliance on its so-called "plain language" interpretation of the parties' Arbitration Agreement would permit a clever-pleading end-run around any and all arbitration provisions. Such an interpretation, if accepted, would require parties to litigate related disputes in multiple forums, which is exactly the opposite intent of the applicable state and federal arbitration acts. *See e.g., Zabinski*, 553 S.E.2d at 118 (stating "The policy of the United States and South Carolina is to favor arbitration of disputes." (citations omitted)). As noted in Appellant's Initial Brief, the facts as plead by the Plaintiff show the relatedness of claims 3 and 4. *Id.* at 7 (noting, as set forth above, claim 3 for Civil Conspiracy is based on alleged "ouster" of Charping from the LLC, and claim 4 for Defamation is based on allegations that Charping "embezzled" from the LLC / company bank account).

Appellant would respectfully submit that the parties' Agreement language stating, "except as may otherwise be provided herein," (R. pp. 160, 249, underlining emphasis added), was included in the form partnership agreement utilized by the parties as a means of *maybe* reserving the right to set out specific claims, but for which no such setting apart was done.

In fact, Respondent has previously argued that the Plaintiff / Respondents' claim for "dissolution" required separate treatment under this plain language theory. (R. pp. 228, lines 10-24). Respondent apparently abandons this "dissolution" argument in their Brief to this Court. Presumably, this is because the lower court lumped Respondent's claim 5 for "Appointment of Receiver, Accounting, and Judicial Dissolution," (R. pp. 3-4), and further because the parties' Operating Agreement nowhere sets out these *three* types of claims as claims that "may" be "except[ed]" from the parties' arbitration provision.

For at least these reasons, Appellant respectfully requests that this Court grant its appeal

and find that the claims, as plead by the Plaintiff Respondent, are within the scope of the parties' arbitration agreement and order the entire dispute be stayed and all claims sent to arbitration.

Respectfully submitted,

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May 8, 2019

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CERTIFICATE OF COUNSEL

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

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