THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2017-CP-40-02822
Appellate Case No: 2018-001536

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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 RESPONDENTS PALMETTO WILDLIFE EXTRACTORS, LLC AND PATRICK CHARPING

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT CORRECTLY RELY ON THE PLAIN LANGUAGE OF THE OPERATING AGREEMENT IN HOLDING CLAIMS 3, 4, AND 5 WERE NOT SUBJECT TO ARBITRATION?

II. DID THE LOWER COURT ERR IN HOLDING CLAIMS 3, 4, AND 5 ARE NOT SUBJECT TO ARBITRATION, WHEN CLAIMS 3 AND 4 ARE INDEPENDENT OF THE OPERATING AGREEMENT AND CLAIM 5 IS SPECIFICALLY EXCLUDED FROM THE ARBITRATION AGREEMENT?

STATEMENT OF THE CASE

This matter arises out of a dispute between two business partners, Appellant Ludy and Respondent Charping. On April 25, 2017, Ludy filed a complaint against Charping in the Lexington County Court of Common Pleas, C.A. No. 2017-CP-32-01416 ("the Lexington Suit"), seeking, various remedies stemming from the Uniform Limited Liability Company Act, S.C. Code Ann. § 33-44-101, et. seq., (the "Act"), including the judicial expulsion and dissociation of Charping from Palmetto Wildlife Extractors, LLC ("Palmetto Wildlife"). (R. 18 §§ 46-47, R. 19 § E). In response, Respondents Charping and Palmetto Wildlife filed the present action on May 10, 2017 seeking the appointment of a receiver, an accounting, and judicial dissolution of Palmetto Wildlife, in addition to other relief. (R. 40-77). Thereafter, Ludy dismissed the Lexington Suit, and filed an Answer to the Verified Complaint and counterclaimed against Plaintiff Charping, reasserting among other claims, those originally raised in the Lexington Suit. (R. 78-91). On June 6, 2017, Appellant Ludy filed a motion to dismiss or stay and compel arbitration of the parties' claims. On June 29, 2017, Plaintiff Charping moved the Court pursuant to S.C. Code Ann. § 15-65-10 for an order appointing a receiver for Palmetto Wildlife, and thereafter moved for the case to be assigned to the business court program. (R. 111-123; R. 124-127).

Following Respondents' submission of a brief in opposition to Ludy's motion to compel arbitration, the Court heard argument from the parties. (R. 128-207). Thereafter, the Court issued an order on June 21, 2018 holding Ludy had not waived his right to arbitrate and held Respondent Palmetto Wildlife Extractors' Derivative Claim for breach of Fiduciary Duty (Claim 1) and Derivative Claim for Aiding and Abetting Breach of Fiduciary Duty (Claim 2) were subject to arbitration, and thus dismissed. (R. 3). The Court also held the remaining claims for Civil Conspiracy (Claim 3), Defamation (Claim 4), and Appointment of a Receiver, Accounting, and Judicial Dissolution (Claim 5) were not subject to arbitration and thus, stayed pending the arbitration. (R. 3-4).

On, June 20, 2018, Appellant moved the lower court to reconsider its June 21, 2018 order. (R. 208-213). The lower court affirmed its ruling on July 23, 2018. (R. 6-8). Thereafter, Appellant filed a notice of appeal.

FACTS

Effective October 13, 2014, Charping acquired a 50% interest in Palmetto Wildlife from Defendant Ludy in exchange for a capital contribution of $49,000. (R. 45 ¶ 7; R. 118 ¶ 2). Under the terms of the operating agreement, Charping and Ludy were to share equal control over the financial rights of Palmetto Wildlife. (R. 45 ¶ 8; R. 118 ¶ 2). Ludy was granted a 51% governance interest, which is defined as "all of a Member's rights as a Member in the Company, other than financial rights." (R. 46 ¶ 9; R. 118 ¶ 3).

Despite agreeing to share 50% of all profits from Palmetto Wildlife, since 2015 Ludy has taken in excess of $126,000 more than Charping from the financial accounts of Palmetto Wildlife. (R. 46 ¶ 10; R. 118 ¶ 4). In fact, Ludy has used Palmetto Wildlife's bank accounts as his own personal accounts, writing checks and withdrawing funds to pay for non-business expenses. (R. 46

¶ 11; R. 118 ¶ 5). These personal expenditures include dues payments to Swinger lifestyle websites, attorneys' fees payments for Ludy's girlfriend's divorce lawyer, payments to Ludy's girlfriend, and payments to start a new business with Ludy's girlfriend. (R. 46-47 ¶¶ 12-15; R. 118 ¶ 5).

By the end of 2015, Charping had enough of Ludy's conduct. As a result, Charping and Ludy amended the operating agreement to establish set salaries for each and to prohibit Ludy from withdrawing money for personal use unless agreed to by Charping. (R. 47 ¶ 16; R. 119 ¶ 6). Nevertheless, Ludy continued using the business account for personal use, withdrawing approximately $19,347.39 for personal expenses in 2016 and $3,729.76 in personal expenses during the first quarter of 2017. (R. 47 ¶ 17; R. 119 ¶ 7). In addition, Ludy withdrew $57, 944.92 for tax payments in 2016, whereas Charping only withdrew $24,197.62 – a difference of $33,747.30. (R. 47 ¶ 18; R. 119 ¶ 8).

Moreover, whenever Charping would withdraw funds in an effort to start reducing the imbalance in the capital accounts, Ludy would become very agitated, upset, and confrontational. (R. 47 ¶ 19; R. 119 ¶ 9). As early as March 2017, Ludy began restricting Charping's access to monitor the expenses incurred by Palmetto Wildlife. (R. 119 ¶ 9, R. 120-122 ¶12). For example, on March 31, 2017, Ludy removed Charping's administrative access to financial information and customer data within Palmetto Wildlife's QuickBooks software; thereby, preventing him from writing estimates while working, updating financial information on large projects, and communicating with customers regarding the status of their accounts. (R. 120-122 ¶ 12).

In April 2017, Charping took a permissible tax draw of $32,000 after verifying this amount with Palmetto Wildlife's tax accountant. (R. 47 ¶ 20; R. 119 ¶ 9). Thereafter, Ludy snapped, accused Charping of theft, and blocked Charping's access to Palmetto Wildlife's accounting

software and social media sites. (R. 47 ¶ 21; R. 119 ¶ 9). Furthermore, Ludy and First Community Bank removed Charping from the bank account, preventing him from accessing any funds or viewing any account information. (R. 47 ¶ 22; R. 119-120 ¶¶ 9-10). Subsequently, Ludy failed to make loan payments owed by Palmetto Wildlife that Charping personally guaranteed, thereby harming Charping's credit and exposing him to personal liability. (R. 48 ¶ 23; E. 119-120 ¶ 10). Ludy's failure to make timely payments also negatively impacts the credit history of Palmetto Wildlife. (R. 119-120 ¶ 10).

Following Charping's filing of this suit, Ludy has: (1) continued to miss loan payments of the business guaranteed by Charping, (2) removed Charping from accessing all commercial revolving accounts of the business that are also guaranteed by Charping, (3) removed Charping's access to company financial and scheduling software, customer accounts, and payroll data, (4) refused to distribute Charping's earnings; (5) terminated Charping's employment as of June 16, 2017; (6) changed all of the locks to the Palmetto Wildlife building for which Charping is the sole signor on the lease renewal; and (7) sent Charping self-serving emails and communications containing factually inaccurate statements in an attempt to construct a paper record to presumably defend his improper conduct. (R. 120-122 ¶¶ 12-15).

STANDARD OF REVIEW

A lower court's determination as to whether a claim is subject to arbitration is subject to de novo review. See Gissel v. Hart, 676 S.E.2d 320, 323 (S.C. 2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. (citing Aiken v. World Finance Corp. of South Carolina, 644 S.E.2d 705 (S.C. 2007).

ARGUMENT

I. THE LOWER COURT CORRECTLY RELIED ON THE PLAIN LANGUAGE OF THE OPERATING AGREEMENT IN HOLDING CLAIMS 3, 4, AND 5 WERE NOT SUBJECT TO ARBITRATION.

"When construing a contract, the best evidence of the parties' intent is the contract's plain language." N. Am. Rescue Prods., Inc. v. Richardson, 769 S.E.2d 237, 240 (S.C. 2015). "If a contract's language is unambiguous, the plain language will determine the contract's force and effect." Id. (citing Lee v. Univ. of S.C., 757 S.E.2d 394, 397 (S.C. 2014)).

Appellant argues that language from the operating agreement illustrates that the parties intended for an arbitrator, not the court, to decide what claims are subject to arbitration. (App. Br. at 5-6). However, this argument incorrectly assumes that Respondent Charping's claims for civil conspiracy (Claim 3) and defamation (Claim 4) were disputes one could reasonably foresee at the time he entered into the agreement. See Partain v. Upstate Automotive Grp., 689 S.E.2d 602, 605 (S.C. 2010) (holding "where the claim presented was clearly not within the contemplation of the parties, [] a court [will] decline to enforce an otherwise proper arbitration agreement.") Under Appellant's reasoning, any dispute that was tangentially related to the operating agreement – regardless of the involvement of a third party - would be swallowed by the arbitration provision. For example, it is not unheard of for business partners to fight over money. Under Appellant's interpretation, if such fighting results in a physical altercation between the partners – even if it involves a third person assisting one of the partners in the fight – the resulting claim for civil assault and battery would have to go before an arbitrator for a determination it did not fall within the scope of the arbitration clause. Such an overreaching, expansive interpretation of the language in this operating agreement cannot be said to have been contemplated by the parties when entering into the operating agreement. Nor should it have. The lower court can say with "positive

assurance" that Claims, 3, 4, and 5 are not subject to arbitration, and thus, there is no need to refer the matter to an arbitrator. See South Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 427 S.E.2d, 22, 25 (S.C. 1993).

Moreover, the language of the operating agreement makes clear the parties intended that Claim 5 not fall within the scope of the arbitration provision. As set forth in Paragraph 12.14 of the operating agreement, "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…" (emphasis added). The inclusion of this language in Paragraph 12.14 necessitates a finding that it was the parties' intent that the arbitration provision would not automatically apply to any and all claims. If the parties had intended for the arbitration clause to apply to all claims, there would have been no reason to include language carving out an exception to the arbitration provision.

Accordingly, the ruling of the lower court should be affirmed.

II. THE LOWER COURT CORRECTLY FOUND CLAIMS 3, 4, AND 5 ARE NOT SUBJECT TO ARBITRATION, BECAUSE CLAIMS 3 AND 4 ARE INDEPENDENT OF THE OPERATING AGREEMENT AND CLAIM 5 IS SPECIFICALLY EXCLUDED FROM THE ARBITRATION AGREEMENT.

Claims 3 and 4 are independent of the operating agreement, and therefore, are not subject to arbitration. See Simpson v. World Fin. Corp. of South Carolina, 623 S.E.2d 877, 881 (S.C. Ct. App. 2006). Claim 5 is not subject to arbitration because the plain language of the operating agreement illustrates he parties intended to carve-out such a claim from arbitration. Accordingly, the lower court's order should be affirmed.

a. Claims 3 and 4 are independent torts an unforeseen by Charping; therefore, they are not subject to arbitration.

Respondent Charping could not have foreseen that Appellant would engage in the tortious conduct underlying Respondent Charping's claims for civil conspiracy and defamation; therefore, such claims are properly outside the scope of the arbitration clause. See Partain v. Upstate Automotive Grp., 689 S.E.2d 602, 605 (S.C. 2010) (holding "where the claim presented was clearly not within the contemplation of the parties, [] a court [will] decline to enforce an otherwise proper arbitration agreement.") Contrary to Appellant's characterization of his defamatory statements, this is not a case in which one partner generically claimed another partner incorrectly pulled money from the company. (Brief at 7). Rather, Appellant sent a text message to Charping's wife – an independent third party – accusing Charping of engaging in a criminal offense and implying a report to authorities had been made. (R. 51. ¶ 51). This statement is libelous and actionable *per se.* See Folkens v. Hunt, 348 S.E.2d 839 (S.C. Ct. App. 1986) (citing Smith v. Phoenix Furniture Co., 339 F.Supp. 969, 971 (D.S.C. 1972)). This claim for defamation, Claim 3, can stand on its own, independent of the operating agreement, and thus the lower court appropriately found it was not subject to arbitration. See Simpson, 623 S.E.2d at 881.

Similarly, Charping's claim for civil conspiracy, Claim 4, is a tort independent of the operating agreement, and thus, not subject to arbitration. Appellant cannot in good faith argue this claim should be encompassed within the arbitration clause because it is patently unreasonable to expect that Charping contemplated Ludy would engage in a conspiracy with the bank – a third party entirely independent of the company - when he entered into the operating agreement. Such behavior is outrageous and not conduct Charping could have reasonably foreseen. See Partain v. Upstate Automotive Grp., 689 S.E.2d 602, 605 (S.C. 2010) (citing Aiken v. World Fin. Corp. of South Carolina, 644 S.E.2d 705, 709 (S.C. 2007)). Accordingly, the lower court correctly held

Claim 4, as well as Claim 3, "do not implicate the parties' contractual agreement and are not subject to arbitration." (R. 3).

b. The plain language of the operating agreement excludes Claim 5 from arbitration.

The lower court correctly relied on the plain language of the operating agreement as the best evidence of the parties' intent and properly held Claim 5 is not subject to the arbitration provision. See N. Am. Rescue Prods., Inc., 769 S.E.2d at 240. The plain language of Section 11 of the operating agreement clearly illustrates dissolution pursuant to Paragraph 11.1.3 is within the carve-out of exceptions to the arbitration provision in Paragraph 12.14. Specifically, Paragraph 11.1.3 plainly states that a Member seeking dissolution may do so by making application to the Court and upon entry of a judicial decree as provided by Section 33-44-810 of the Act. In the present case, Respondents have done just this and specifically cited to this Section in their request for judicial dissolution. (R. 52 ¶ 57). Accordingly, the lower court's holding that Claim 5 is not subject to arbitration because the plain language of the operating agreement specifically requires a finding by a court should be affirmed. (R. 3-4).

CONCLUSION

Based on the foregoing, Respondents respectfully request the Court affirm the order of the lower court.

By: _____

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

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