THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-23-02759

Glenn P. Howell, ... Appellant,

v.

Covalent Chemical LLC and Matthew W. Rowe, ... Respondents.

FINAL BRIEF OF APPELLANT

David E. Rothstein
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870
Attorney for Appellant

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(2) Did the Circuit Court mistakenly disregard Section 15-7-120(A) of the South Carolina Code of Laws, which expressly overrides contractual forum selection clauses or mandatory venue provisions and allows plaintiffs to file suits in South Carolina notwithstanding such contractual provisions?

(3) Did the Circuit Court err in applying a Texas choice-of-law provision that is plainly contrary to the public policy of the State of South Carolina as expressed in both Section 15-7-120(A) and the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq., which expressly forbids employers of workers in South Carolina from privately contracting around the statutory protections for compensation of South Carolina workers?

(4) Did the Circuit Court err in failing to give any consideration to the forum non conveniens factors of convenience of parties, convenience of witnesses, and the interests of justice?

STATEMENT OF THE CASE

Appellant, Glenn P. Howell, filed this case on May 9, 2018, asserting causes of action for violation of the South Carolina Payment of Wages Act, breach of contract, and an equitable accounting. Appellant's claims arise out of his former employment as a sales representative for Respondent Covalent Chemical LLC (hereinafter "Covalent"). Respondent Matthew W. Rowe is the sole owner of Covalent. Appellant asserts that Respondents failed to pay him all of the sales commissions to which he was entitled under his Employment Agreement with Covalent. Appellant

filed an Amended Complaint as a matter of right pursuant to Rule 15(a), SCRCP, on June 8, 2018 to correct a typographical error regarding one of the dates in the original Complaint.

On July 16, 2018, Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(3), SCRCP, asserting that venue was improper in South Carolina based on a purported forum selection clause in the Employment Agreement that specified Harris County, Texas as the venue for any dispute under the Employment Agreement. On September 24, 2018, Respondents filed an Amended Motion to Dismiss repeating their venue arguments and also raising an alternative request to compel arbitration based on a purported arbitration provision in the Employment Agreement.[1]

Respondents' Motion to Dismiss was originally scheduled for a hearing on August 31, 2018, before the Hon. Robin B. Stilwell, Circuit Court Judge, but was later rescheduled for October 4, 2018, before the Hon. Letitia H. Verdin, Circuit Court Judge. The Greenville County Court of Common Pleas has a memorandum policy, which for Judge Verdin requires all briefs or memoranda to be e-filed at least 72 hours prior to the scheduled hearing. www.greenvillecounty.org/CourtSupport/MemPolicies.aspx. On September 30, 2018, Appellant's counsel filed a Memorandum of Law in Opposition to Defendants' Motion and Amended Motion to Dismiss, which included four Exhibits, including an Affidavit of Glenn P. Howell. Respondents did not file any memorandum or exhibits in support of their motion, other than a copy of the Employment Agreement, which was attached as an exhibit to the Motions. This is the same version of the Employment Agreement that Plaintiff had previously attached to both his original and

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[1]Judge Verdin did not address Respondents' alternative request to compel arbitration. Respondents did not file a motion for reconsideration to preserve that issue for appeal. In any event, the arbitration clause's use of the phrase "can be submitted by the Parties to Alternate Dispute Resolution, (Employment Agreement, at 7, ¶ 8(K)) (R. p. 31), is permissive, not mandatory.

Amended Complaints.

At the conclusion of the hearing, Judge Verdin indicated that she would take the matter under advisement. On October 5, 2018, Judge Verdin entered a Form 4 Order purporting to deny Respondents' Motion to Dismiss. The Statement of Judgment was one sentence: "Defendant Covalent Chemical's Motion to dismiss is hereby denied based upon a finding that the proper forum for the action is Texas and interpretation of the terms and provisions of the contract should be governed by the laws of Texas." (Order of Oct. 5, 2018) (R. p. 1). The Form 4 Order also indicated that the Order does not end the case. (Id.).

On October 8, 2018, Respondents' counsel emailed Judge Verdin seeking clarification of the Form 4 Order because of the apparent inconsistency between the denial of the motion and the Statement of Judgment. Judge Verdin responded by email stating, "I am so sorry. That was my mistake and will have it corrected shortly." (Email thread from Oct. 8, 2018) (R. p. 70). On October 9, 2018, the Court entered another Form 4 Order, with the Statement of Judgment stating, "Defendant Covalent Chemical's Motion to dismiss is hereby granted based upon a finding that the proper forum for the action is Texas and interpretation of the terms and provisions of the contract should be governed by the laws of Texas." (Order of Oct. 9, 2018) (R. p. 4). The Order Information at the bottom of the form still indicated that the Order does not end the case. (Id.).

After receiving the corrected Order on October 9, Appellant's counsel sent another email to Judge Verdin seeking clarification. (Email thread from Oct. 9, 2018) (R. p. 74). Judge Verdin's law clerk responded, "I'm writing in response to the emails that have been exchanged this week about the above-referenced case. I would first like to apologize for any confusion stemming from the wording in the Form 4. Unfortunately, Judge Verdin has been out of the office this week due to

unforeseen family matters and therefore has been limited in her access to resources such as email and e-filing. The order is intended to effectively dismiss the case here in South Carolina based on the Court's finding that Texas would be the proper forum for the case. Once the Judge is able to return to the office, she will review all of your emails and the case materials again and we will amend the Form 4 again or issue a formal order to reflect that decision with more clarity." (Email of Oct. 9, 2018) (R. p. 76).

On October 16, 2018, Judge Verdin entered a third Form 4 Order, stating "The Motion to Dismiss filed by Defendants Covalent Chemical LLC and Matthew W. Rowe is hereby granted and the action is dismissed due to South Carolina being the improper venue." (Order of Oct. 16, 2018) (R. p. 7). The Order Information section indicated that the Order ends the case. (Id.).

On October 17, 2018, at approximately 4:35 p.m., Appellant's counsel filed a Motion for Reconsideration or to Alter or Amend Judgment. (R. p. 65). The next morning, October 18, 2018, at 11:24 a.m., the Court entered another Form 4 Order merely stating, "The plaintiff's Motion for Reconsideration is hereby denied." (Order of Oct. 18, 2018) (R. p. 10). On October 19, 2018, Judge Verdin entered an Order rescinding the previous Form 4 Orders prior to her October 16, 2018 Order. (Order of Oct. 19, 2018) (R. p. 13).

Appellant timely filed and served the Notice of Appeal on October 18, 2018.

FACTS

As noted earlier, this case arises out of Appellant's previous employment with Respondent Covalent as a sales representative. Appellant alleges that Respondent Covalent breached his Employment Agreement by failing and refusing to pay his commissions and expense reimbursements in a timely manner. (Amended Complaint, at 3-5, ¶¶ 12, 17 & 25) (R. pp. 35-37).

Appellant was recruited to work for Respondent Covalent by Respondent Rowe, who previously worked with Appellant at another chemical company called Brenntag. (Howell Aff., at 1, ¶ 3) (R. p. 78). Respondent Rowe actually traveled to Greenville, South Carolina on two separate occasions in the summer of 2015 to recruit Appellant to come to work for Respondent Covalent. (Howell Aff., at 1, ¶ 4) (R. p. 78). Respondent Rowe emailed a proposed Employment Agreement to Appellant on or about September 24, 2015. Less than a week later, on September 30, 2015, Appellant signed the final version of the Employment Agreement while he was in Greenville, South Carolina and returned it to Respondent Rowe. (Howell Aff., at 2, ¶¶ 5-6) (R. p. 79). Appellant's address for notice as clearly stated in the Employment Agreement is a Greenville, SC address. (Employment Agreement, at 6, ¶ 8(F)) (R. p. 30).

Respondent Rowe reportedly purchased Respondent Covalent in mid-2015, and re-established the company in Raleigh, North Carolina. The company had previously been located in Houston, Texas. (https://www.manta.com/c/mh19vww/covalent-chemical-llc). The North Carolina Secretary of State's Office business registration report for Respondent Covalent shows that the new Covalent Chemical LLC was formed on June 4, 2015, as a North Carolina Limited Liability Company. (Pl.'s Memo. in Opp., Ex. B) (R. p. 83).

Appellant testified in his Affidavit that his employment never had anything to do with Texas. (Howell Aff., at 2, ¶ 8) (R. p. 79). His sales territory never included Texas, and the only time he ever traveled to Texas was shortly after he started working with Respondent Covalent, when he attended an independent trade conference in Dallas[2] as part of his training. (Howell Aff., at 2, ¶ 8-9) (R. p.

[2]Dallas is approximately 240 miles from Houston, or about a three-and-a-half hour drive. (See https://www.mapquest.com/directions/from/us/tx/houston-282040105/to/us/tx/dallas). The almost four-hour travel distance between Dallas and Houston is roughly the same travel distance as

79). Paragraph 8(J) of the Employment Agreement appears to be a left-over, boilerplate provision from the former incarnation of Covalent Chemical, before Respondent Rowe purchased the entire company and moved it to North Carolina. The email Appellant originally received from Respondent Rowe with the first draft of the Employment Agreement had been forwarded from a lawyer in Houston. A copy of that email string, without the attachments, was submitted as Exhibit C to Appellant's Memorandum to the Circuit Court. (R. p. 85).

Significantly, Respondents never submitted any Affidavit or other documents to refute Appellant's Affidavit and attachments. No one appeared at the hearing with Respondents' counsel or offered any sworn testimony or documentary evidence in support of Respondents' motion. Respondents' counsel made some uncorroborated statements during the hearing to the effect that Houston is a major hub of chemical distribution activity in the United States and that Respondent Covalent has some warehouses in Houston (Transcript, at 6, ll. 12-14, 18-19) (R. p. 59); however, those statements are not sufficient to refute Appellant's Affidavit that his employment never had anything to do with the State of Texas. (Howell Aff., at 2, ¶ 8) (R. p. 79).

ARGUMENTS

1. THE CIRCUIT COURT MISREAD THE ACTUAL LANGUAGE OF THE EMPLOYMENT CONTRACT AND DISREGARDED THE WELL-ESTABLISHED PRINCIPLE THAT ANY AMBIGUITY IN THE CONTRACT SHOULD HAVE BEEN CONSTRUED IN FAVOR OF APPELLANT AS THE PARTY WHO DID NOT DRAFT THE CONTRACT.

The phrase "words matter" is particularly true in the law of contracts. As the South Carolina Supreme Court has repeatedly recognized, "'The cardinal rule of contract interpretation is to

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between Greenville, SC and Raleigh, NC, Savannah, GA, or Chattanooga, TN.

ascertain and give legal effect to the parties' intentions as determined by the contract language.'" Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (emphasis added) (quoting Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). One of the most fundamental rules of contract laws is "[w]here the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014).

Here, a careful reading of the actual language of the Employment Agreement does not support the Circuit Court's conclusion that any case arising out of the Employment Agreement must be brought in only Harris County, Texas. Section 9(J) of the Employment Agreement provides, in relevant part, "THE PARTIES AGREE TO THE JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN HARRIS COUNTY, TEXAS." (Employment Agreement, at 7, ¶ 8(J) (R. p. 31) (emphasis added). As the underlined language indicates, this is merely a waiver of personal jurisdiction. The Agreement does not state that any dispute arising out of this agreement must or shall be heard only in the courts of Harris County, Texas; it merely states that the parties waive personal jurisdiction for the courts in Texas to hear such a case. This is plainly not an exclusive forum selection clause. In fact, the Employment Agreement does not use the words "forum" or "venue" at all; nor is there any mandatory or proscriptive language such as "shall" or "may only" or "exclusive(ly)." As first-year law students learn in their first course on Civil Procedure, the terms "jurisdiction" and "venue" are distinctly different concepts in the law.

To the extent that the phrase "agree to the jurisdiction" could be interpreted as the Circuit Court apparently did, the phrase is inherently ambiguous because it is capable of being construed in

multiple ways. South Carolina Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). Of course, "[a]mbiguous language in a contract . . . should be construed liberally and interpreted strongly in favor of the non-drafting party." South. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

Here, the Circuit Court improperly construed the alleged "forum provision" (as Respondents' counsel called it) in favor of Respondents, instead of appropriately giving Appellant the benefit of the doubt.

2. THE CIRCUIT COURT'S ORDER DISREGARDS SECTION 15-7-120(A) OF THE SOUTH CAROLINA CODE, WHICH EXPRESSLY OVERRIDES CONTRACTUAL FORUM SELECTION PROVISIONS AND ALLOWS SOUTH CAROLINA RESIDENTS TO BRING CASES IN SOUTH CAROLINA NOTWITHSTANDING SUCH CONTRACTUAL PROVISIONS.

Even if Section 9(J) of the Employment Agreement were construed as a mandatory forum selection clause, South Carolina statutory law clearly allows the case to be brought in South Carolina, because Appellant is a citizen of South Carolina, and his employment was primarily based out of South Carolina. (Howell Aff., at 2-3, ¶¶ 9-11) (R. pp. 79-80). Section 15-7-120(A) of the South Carolina Code specifically allows a case to be brought in South Carolina notwithstanding a provision in a contract that purports to require any claims to be brought in another state:

> Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

S.C. Code Ann. § 15-7-120(A). Section 15-7-120(A) reflects South Carolina's strong public policy

disfavoring forum selection clauses. See Consolidated. Insured Benefits, Inc. v. Conseco Med. Ins. Co., 370 F. Supp. 2d 397, 399 (D.S.C. 2004).

Judge Verdin's one-sentence order does not mention Section 15-7-120(A) at all, much less does she attempt to explain why this straight-forward statutory provision does not apply to this case.

3. THE CIRCUIT COURT ALSO ERRED IN APPLYING THE TEXAS CHOICE-OF-LAW PROVISION OF THE EMPLOYMENT AGREEMENT BECAUSE APPLICATION OF TEXAS LAW WOULD BE DIRECTLY CONTRARY TO THE PUBLIC POLICY OF SOUTH CAROLINA, AS EXPRESSED IN BOTH SECTION 15-7-120(A) AND THE SOUTH CAROLINA PAYMENT OF WAGES ACT.

In the case of Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 621 S.E.2d 352 (2005), the South Carolina Supreme Court recognized that contractual choice of law provisions will not be enforced in South Carolina where they are "invalid as a matter of law or contrary to public policy in South Carolina." Id. at 159, 621 S.E.2d at 353. In Stonhard, the court refused to apply New Jersey law to amend an invalid covenant not to compete in an employment contract that contained a New Jersey choice-of-law provision, because New Jersey's blue pencil law allowed courts greater authority to re-write contracts than South Carolina's well-established, narrow blue-pencil rule, which only allows courts to strike through invalid provisions. Id. at 159-60, 621 S.E.2d at 353-54.

The Circuit Court here erred in relying on the Texas choice-of-law provision in the Employment Agreement, because applying Texas law would squarely contradict the public policy embodied in two provisions of the South Carolina Code of Laws: S.C. Code Ann. § 15-7-120(A), as discussed above, and S.C. Code Ann. § 41-10-100, of the South Carolina Payment of Wages Act.

During the hearing on the motion to dismiss, Respondent's counsel's only attempt to rebut

Appellant's argument under Section 15-7-120(A) was an assertion that this section does not apply to the Employment Agreement at issue in this case because of the choice-of-law provision stipulating that the law of Texas governs the case. (Transcript, at 9, ll. 6-9) (R. p. 62). This circular argument runs squarely into the holding of Stonhard, that South Carolina courts will not give effect to contractual choice of law provisions that are contrary to the public policy of South Carolina.

Similarly, and perhaps more importantly, the South Carolina Payment of Wages Act provides that employers of workers in South Carolina cannot attempt to circumvent the requirements of that statute by private contract. S.C. Code Ann. § 41-10-100 ("No provision of this chapter may be contravened or set aside by a private agreement."). The South Carolina Payment of Wages Act is remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld from them; thus, the statute is supposed to be interpreted liberally in light of that underlying purpose. See Abraham v. Palmetto Unified School Dist. No. 1, 538 S.E.2d 656 (S.C. Ct. App. 2000). Accordingly, the parties to an employment contract cannot avoid application of the S.C. Payment of Wages Act by attempting to agree that only Texas law applies to an employment relationship whereby the employee is "employed in South Carolina."

By ruling that Texas law applies in this case, the Circuit Court would, in effect, be allowing Respondents to contravene the stringent requirements of the South Carolina Payment of Wages Act for an individual employee who was recruited to work in South Carolina, whose territory largely consisted of the Upstate of South Carolina, and who signed the Employment Agreement in South Carolina, all of which was established by the undisputed Affidavit of Appellant in this case. (Howell Aff., at 1-3, ¶¶ 4, 6, & 9) (R. pp. 78-80). There can be no doubt that Respondents fall within the definition of "employer" under the SC Payment of Wages Act, S.C. Code Ann. § 41-10-10(1), and

that the Act therefore applies to Respondents. S.C. Code Ann. § 41-10-20 ("This chapter applies to all employers in South Carolina.").

The Circuit Court's complete disregard for the public policies of South Carolina as expressed in Sections 15-7-120(A) and 41-10-100 of the South Carolina Code was reversible error.

4. THE CIRCUIT COURT ERRED IN FAILING TO GIVE ANY CONSIDERATION TO THE DOCTRINE OF FORUM NON CONVENIENS, SPECIFICALLY THE CONVENIENCE OF PARTIES, CONVENIENCE OF WITNESSES, AND INTERESTS OF JUSTICE, ALL OF WHICH FAVOR VENUE IN SOUTH CAROLINA.

In Braten Apparel Corp. v. Bankers Tr. Co., 273 S.C. 663, 259 S.E.2d 110 (1979), the South Carolina Supreme Court stated that pursuant to the doctrine of forum non conveniens, "unless the balance of factors strongly favors the defendant, the plaintiff's choice of forum should be left undisturbed." Id. at 670, 259 S.E.2d at 114. The Braten Court formally adopted the doctrine of forum non conveniens, which the court noted had been recognized not only in federal courts, but also by a majority of 34 states at the time of the opinion in 1979. Although the Braten Court recognized that the decision to apply the doctrine "lies within the discretion of the trial court," the Supreme Court determined that the circuit judge committed reversible error by failing to apply the doctrine in considering defendants' motion to dismiss. Id. at 667, 259 S.E.2d at 112-13.

Here, the Circuit Court did not give any consideration whatsoever to the factors of the forum non conveniens, doctrine, which generally examines the convenience of the parties or witnesses and the interests of justice. This case has nothing whatsoever to do with the State of Texas, despite boiler-plate language in the Employment Agreement purporting to be a Texas contract. Appellant's employment had nothing to do with the State of Texas. Appellant was recruited by Respondent

Rowe in South Carolina. Appellant lived in South Carolina throughout his entire employment with Respondent Covalent, his sales territory largely consisted of the Upstate of South Carolina, and most of his work was performed in South Carolina, for customers in South Carolina. By contrast, Respondents did not identify any party or witness for whom Texas would be a more convenient forum. Respondent Covalent is now headquartered in Raleigh, North Carolina, having moved from Texas in mid-2015 before Appellant even started his employment with the Company. Respondent Rowe lives in North Carolina. At the hearing, the only mention of Texas made by Respondents' counsel was some warehouse properties that Respondent Covalent allegedly owns in the Houston area. Accordingly, nothing relating to the subject matter of this case occurred in or is located in Texas.

With regard to the interests of justice, the State of South Carolina has a significant interest in adjudicating this dispute. This case is clearly governed by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq. The Act defines the term "employer" as "every person, firm, partnership, association, corporation . . . and any agent or officer of the above classes employing any person in this State." S.C. Code Ann. § 41-10-10(1). Respondent Rowe is subject to personal liability under the Act because he also falls within the definition of employer. See Dumas v. InfoSafe Corp., 320 S.C 188, 463 S.E.2d 641 (Ct. App. 1995).

Furthermore, as discussed above, South Carolina's courts have been very protective of the rights of South Carolina citizens in contractual choice of law matters. See Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 621 S.E.2d 352 (2005).

Texas is clearly not a convenient forum for anyone in this dispute. Respondents' only possible motivation for filing the motion to dismiss is to make the litigation more difficult and costly

for Appellant, in an effort to wear Appellant down and force him to accept a lower settlement value for the case. Such tactics are not a proper use of the litigation system and should not have been countenanced by the Circuit Court.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the Circuit Court's order dismissing the case on improper venue grounds. Notwithstanding the Employment Agreement's Texas choice-of-law provision and the provision regarding "jurisdiction" as to Harris County, Texas, Appellant's case was properly filed in South Carolina as an appropriate venue.

Respectfully submitted,

May 8, 2019

David E. Rothstein
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870
Attorney for Appellant

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CERTIFICATE OF COUNSEL

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

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David E. Rothstein
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870
Attorney for Appellant